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Indian Appeals

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART.,
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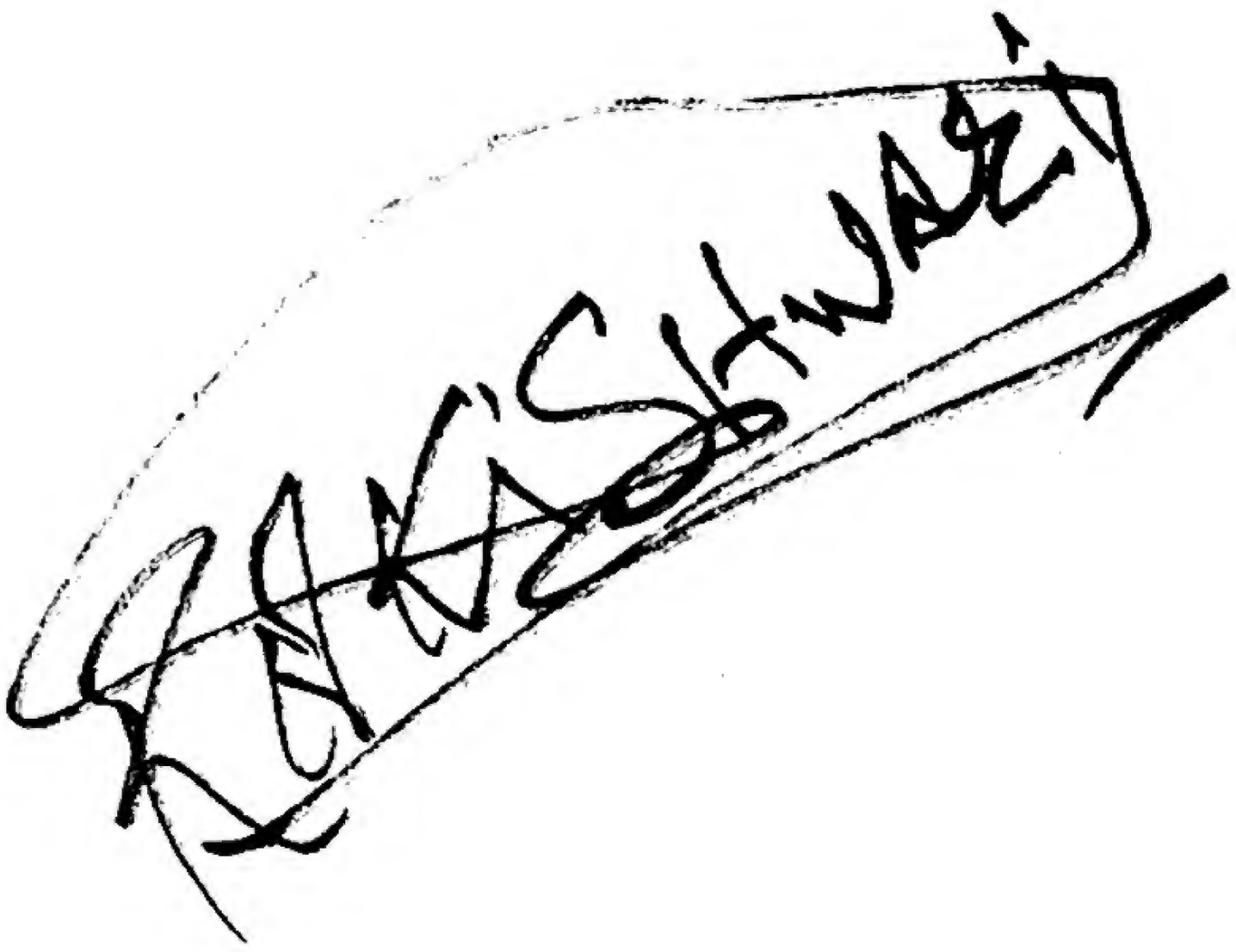

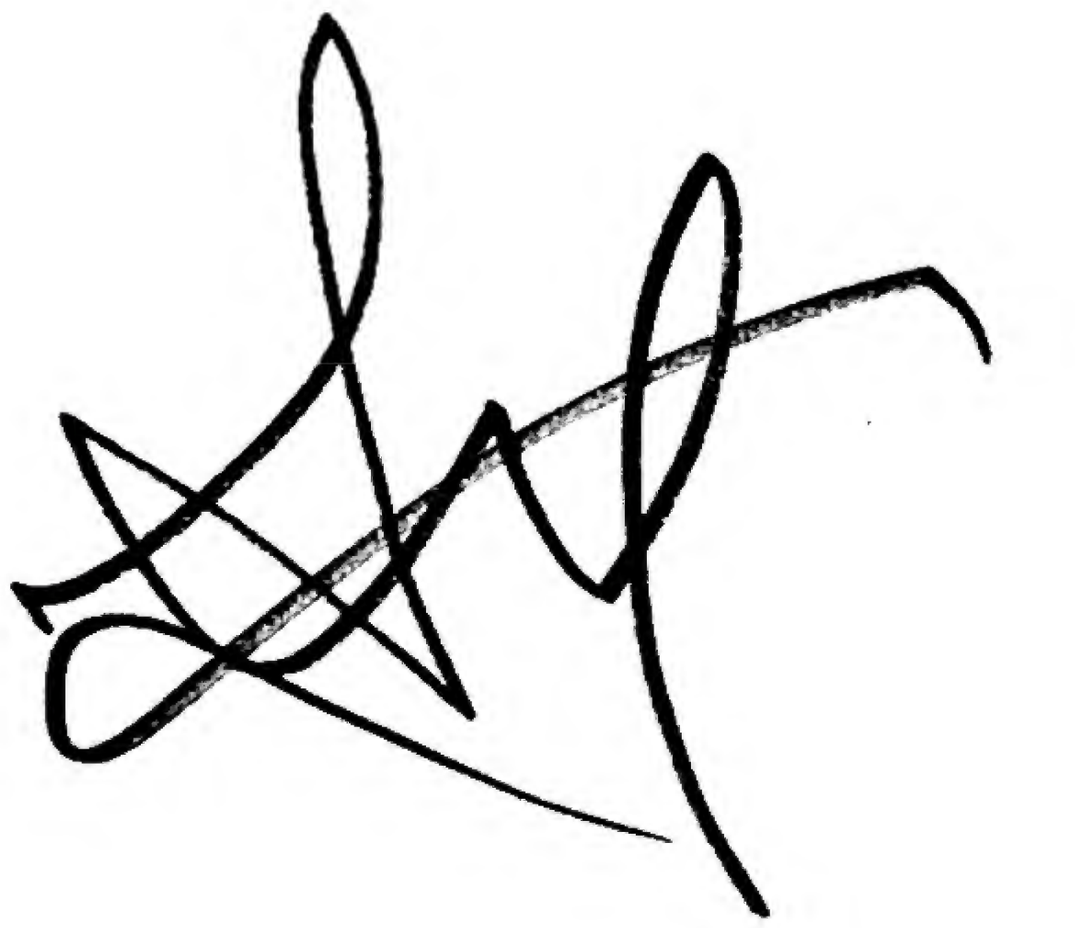

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A TABLE OF THE NAMES OF THE CASES REPORTED

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

MAHOMED MUSA (SINCE DECEASED) AND OTHERS .. } APPELLANTS;

AND

AGHORE KUMAR GANGULI AND OTHERS. RESPONDENTS.

J. C. *
1914.
Oct. 22, 23;
Nov. 25.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Agreement—Informality—Parties acting upon Agreement—Defects cured by Equity.

By a compromise made in a suit in 1873 it was agreed that mortgaged property should be released from two mortgages, the malikana being thenceforth allotted in agreed proportions to the two mortgagees and the mortgagor, and that the latter should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees. A decree was made in pursuance of the compromise, but the compromise agreement was not registered, nor were the transfers executed. All parties, however, thenceforward acted in every respect as if the transfers had been made, and there were dealings, both by the mortgagor and the mortgagees, with the shares allotted to them under the agreement. In 1908 a suit was instituted to redeem the mortgages:—

Held, that whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished.

APPEAL from a judgment and decree of the High Court (June 16, 1909) reversing a judgment and decree of the second Additional Subordinate Judge of the 24 Parganas.

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

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The suit was instituted by the appellants to redeem two mortgages of 1848 and 1871.

In 1848 one Fazlul Karim mortgaged his zamindari and in 1850 conveyed it to Khodajanessa, his wife, as a gift. In 1853 she granted a patni lease of it under which there was a malikana amounting to over Rs. 15,000 a year. After various immaterial proceedings, in 1870 an agreement was made between Khodajanessa and the then mortgagees by which the amount due upon the mortgage was to be discharged by annual payments out of the malikana.

In 1871 Khodajanessa executed a second mortgage upon the property in favour of a different mortgagee.

In 1873 the mortgagees under the mortgage of 1848 commenced a suit against Khodajanessa to enforce the agreement of 1871. A compromise was agreed to by the parties and a razinama drawn up.

Under the terms of the razinama the amounts due to both mortgagees was agreed and the mortgagees agreed to release the property from the mortgages upon Khodajanessa agreeing to execute deeds of absolute sale or transfer by which a certain proportion of the malikana should be transferred to each of the mortgagees, the balance to remain her property, free from incumbrances. It was also agreed that the mortgagees should get their names registered as proprietors of the proportions of the property to which they were entitled under this arrangement. The compromise was filed, and on November 28, 1873, a decree was made that the suit be decided in pursuance thereof. The terms of the compromise were not recited in the decree.

The compromise agreement was not registered and no transfers or conveyances were ever executed. It appeared, however, that all parties had given complete effect to its terms. Numerous transactions had taken place by the various parties on the basis of the property having been divided in the manner provided by the compromise. As instances of this, in 1875 Khodajanessa mortgaged the share reserved to her, the mortgage deed reciting the arrangement made by the compromise; again, in 1887, she made a deed of gift of that share, the deed of gift being attested by her sons. There had also been transfers of the interests of

the mortgagees. In 1878 the respective mortgagees had caused their names to be registered as proprietors of their shares, and there had been registration of mutation of names in respect of subsequent transfers by them.

In 1908 the plaintiffs, as surviving heirs and representatives of Khodajanessa, instituted the present suit claiming to redeem the mortgages.

The defendants (respondents) pleaded that the suit was barred by limitation, that under the compromise of 1873 the mortgages had come to an end, and that the respective mortgagees had been in possession of their shares adversely to Khodajanessa and the plaintiffs. The Subordinate Judge made a decree for redemption. He held that the terms of the razinama not being incorporated in the decree and not being registered or stamped could not affect immovable property. He also held that the possession was not adverse.

The High Court allowed the appeal. The learned judges held that the mortgages of 1848 and 1871 were extinguished by the agreement and compromise of 1873 and that the right to redeem thereupon ceased to exist. It was accordingly not necessary to consider the question of limitation.

De Gruyther, K.C., and *Dube*, for the appellants. The original title of the respondents was as mortgagees, and the onus is upon them to show that the right to redeem is extinguished. The compromise agreement of 1873 was required to be registered by the Registration Act, 1871, s. 17, and not being registered under that Act it was not effectual to transfer any right in the property: *Pranal Annee* v. *Lakshmi Annee*.(1) The decree did not embody the terms of the compromise, and since it went beyond the scope of the litigation it could not properly be the subject of a decree: *Gurdeo Singh* v. *Chandrikah Singh*.(2) As the compromise is inadmissible in evidence for want of registration, parol evidence of its terms is excluded by the Indian Evidence Act, 1872, s. 92, proviso 4. Mere acquiescence by the plaintiffs, or their predecessors, in the mortgagees' possession is not sufficient

(1) (1890) L.R. 26 Ind. Ap. 101. (2) (1907) I.L.R. 36 Cal. 193.

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to deprive them of their right to redeem: *Khiarajmal* v. *Daim.*(1)

Upjohn, K.C., and *Dunne*, for the respondents. The compromise agreement was a good executory agreement to transfer the right to redeem. Before the Transfer of Property Act, 1882, a transfer of immovable property could be by parol. The agreement has been continually acted upon in every respect by all the parties for thirty-five years. Under these circumstances any defects of form or of probation are cured by equity: *Maddison* v. *Alderson*(2); *Rose* v. *Watson.*(3) Further, the compromise agreement does not come within the agreements referred to in s. 17 of the Registration Act, 1871. Its registration was optional under s. 18, sub-s. 4, of that Act. The provisions of the Indian Evidence Act, 1872, s. 92, do not apply; the agreement did not modify the mortgage deeds, but was an agreement to transfer part of the property included under them.

De Gruyther, K.C., replied.

1914
Nov. 25.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated June 16, 1909. That judgment was pronounced upon and reversed a judgment and decree of the second Subordinate Judge of the 24 Parganas dated August 31, 1908.

The object of the suit is for the redemption of two mortgages dated July 22, 1848, and April 4, 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

Many of the facts of the case are comprised in a chapter which may be said to have definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Fazlul Karim, his wife Khodajanessa obtained from him a conveyance of her husband's zamindari as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged

(1) (1904) L.R. 32 Ind. Ap. 23. (2) (1883) 8 App. Cas. 467.
(3) (1864) 10 H.L.C. 672.

properties. Many and various legal steps took place in that decade, and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation—which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajanessa and the three sons of Ram Chund Mukerji, the mortgagee under the agreement of 1848, in reference to that mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like.

On April 4, 1871, the second mortgage was granted. In 1873 differences, however, arose between Khodajanessa and the mortgagees, and a suit was brought by Ram Chund Mukerji's three sons to enforce against her the agreement come to. This suit was compromised. On November 26, 1873, Khodajanessa entered into a razinama, or agreement of compromise, which razinama was signed by the plaintiffs in that suit. What happened under it may be expressed in Khodajanessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on April 30 she testified as follows: "The suit in the 24 Parganas Court was settled and a solenama executed by the three brothers, a deed of compromise, what is termed a razinama and safinama. On my agreeing to execute a conveyance of the 12 annas share to the three brothers, it was settled. The three brothers and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The razinama contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared, as was the fact, that after the death of the patnidar of the property the realization of the rents had come under the charge of the Court of Wards. And the true point, so far as the present litigation is concerned, of the razinama was this, that it was arranged that from the year 1874 onwards the realization of malikana profits should be as follows: To the plaintiffs in that case and Arun Prokash Ganguli "the malikana profits in respect of 12 annas, 7 gandas,

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2 karas, 1 kag share and the Collectorate revenue both amounting to Rs. 27,386.7.10 as per account given above, and I shall realise the profits in respect of the remaining 3 annas, 12 gandas, 1 kara, 3 kags share and Collectorate revenue both amounting to Rs. 8013.8.10 kist by kist according to the terms of the kabuliyat." The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented to such arrangement and released the said taluqs and all the properties covered by the mortgage deed to me free from the liability for the debt."

It is impossible to read this razinama without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share—set forth as 3 annas, 12 gandas, 1 kara and 3 kags—it was to become and be dealt with by Kodajanessa as her separate property disburdened of debt. The remainder of the 16 annas was also to be similarly and separately owned and enjoyed.

The concluding prayer of the razinama was: "That the Court may be pleased to decide the suit declaring that the plaintiffs shall get the amount claimed to their satisfaction in the manner stated above." The razinama was accordingly produced to the Court, which pronounced upon it as follows: "It is, therefore, ordered that the suit be decided in pursuance of the terms of the razinama, and that the suit be struck off from the list of pending cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the razinama. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold and are in their Lord-

ships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors in title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajanessa's death in the year 1890, and, indeed, from that date until the present time, the property has been managed upon the footing of that division, of the extinction of the mortgage debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly. The details need not be given.

As to Khodajanessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting may be mentioned. In the same year, 1875, she executed a mortgage for her own 3 annas share, and in this deed she recites at length the whole transactions, the separation into shares and so forth.

Transactions of mortgage, sale, &c., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between thirty and forty years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajanessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself.

In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajanessa cannot be maintained. Even if the razinama itself was insufficient, yet in their Lordships' view the decree of the Court, to the sufficiency of which an objection was taken in argument, was obtained upon one footing, and one footing alone, i.e., that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships, in view of the argument strongly pressed upon them, think it right further to say that even although the razinama and the decree taken together were considered to be defective or inchoate as elements making up a final and

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validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson*(1), in the House of Lords, it is no doubt true that there is a locus penitentiae, that is, "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, s. 26, "rei interventus raises a personal exception, which excludes the plea of locus pænitentiæ. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract as if it were perfect; provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson*(2), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these

(1) 8 App. Cas. 467.

(2) 8 App. Cas. 467, at p. 475.

propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 Ves. Sen. 441) may be here repeated: "if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity." Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the judgment of the learned judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondents: *Burton, Yates & Hart.*

J. C.* 1914 *Oct.* 23, 26, 27; *Nov.* 25.

DIGAMBAR SINGH . . . . . APPELLANT;

AND

AHMAD SAID KHAN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Pre-emption—Custom—Evidence—Wajib-ul-arz—Partition into Separate Mahals—Survival of Custom.

A statement in the wajib-ul-arz of a village that there is a custom of pre-emption, which is not in contravention of law, is good prima facie evidence of the custom, without corroborative evidence of instances in which it has been exercised.

Where there has been a partition of the village into separate mahals, a sharer in one of the new mahals who claims a right of pre-emption over land in another mahal must show, either on the construction of the wajib-ul-arz or by other evidence, that the custom survives the partition. Although a fresh wajib-ul-arz has not been prepared at the partition, it does not follow that a custom or contract in force before partition is no longer to have effect or operation; the question must depend upon the circumstances of each case and the inferences to be drawn from the evidence.

Dalganjan Singh v. *Kalka Singh*, (1899) I.L.R. 22 Allah. 1 approved.

APPEAL from a judgment and decree of the High Court (July 15, 1912) reversing a judgment and decree of the Subordinate Judge of Aligarh (March 28, 1911).

The suit was instituted by the appellant in 1910 against the respondent and one Bhawani Das, claiming a right of pre-emption over certain land which had been sold by Bhawani Das to the respondent. Bhawani Das did not defend the suit and was not a party to the appeal.

The property in suit formed part of a mauza known as Pala Kher in which both the appellant and Bhawani Das were sharers at the date of the suit. By his plaint the appellant alleged that the usage of pre-emption existed in the mauza, and that the right thereto was recorded in a wajib-ul-arz in 1863 and again in 1870. It appeared that in 1906 the mauza, which up to that date had been jointly assessed as one mahal, was parti-

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

tioned into five separate mahals and that the shares allotted to the appellant and to Bhawani Das respectively fell into different mahals. By a registered sale deed dated July 22, 1909, Bhawani Das sold the property in suit to the respondent, who had been in possession of it as mortgagee since 1892.

The terms of the wajib-ul-araiz of 1863 and of 1870 appear from the judgments of their Lordships. No new wajib-ul-arz was prepared at the partition.

The respondent pleaded that since the partition in 1906 no coparcenary interest existed between the appellant and Bhawani Das. He denied the alleged custom of pre-emption and pleaded that, in any case, it only applied so long as the village remained a single mahal. He further pleaded that he was a co-sharer with the vendor by reason of his possession as mortgagee.

The Subordinate Judge made a decree in favour of the plaintiff (appellant). He held that the wajib-ul-arz established that there was a custom of pre-emption in the village, that the appellant was entitled thereunder to purchase the property in preference to the respondent, and that this right was not affected by the partition into separate mahals.

The High Court (Sir Henry Richards, C.J. and Tudball, J.), by a judgment delivered on July 15, 1912, allowed the appeal. In the course of his judgment the learned Chief Justice said: "The plaintiff was not a co-sharer in any property with the vendor. No joint and several responsibility existed between the plaintiff and the vendor for the payment of Government revenue. The plaintiff had no right to interefere in any way with the management of any part of the property sold; he was a total stranger in the sense that he did not belong to the coparcenary body which held mahal Bhawani Das. . . . . The result of 'perfect partition' is that the old coparcenary body ceases to exist and new coparcenary bodies in each mahal are created. If the reason for customs of pre-emption is to avoid the introduction of a stranger, the custom which the plaintiff alleges would defeat the object." The learned Chief Justice was also of opinion that the wajib-ul-arz did not record an existing custom, but merely an arrangement for the future between the members of the co-parcenary body.

Tudball, J. agreed with the learned Chief Justice. He further

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held that if the wajib-ul-arz had any force as evidence of custom the vendee, being a mortgagee with possession in the same mahal as the vendor, would be entitled thereunder to purchase even against the plaintiff.

Lowndes, for the appellant. The wajib-ul-araiz record a custom, not merely an agreement. Under Bengal Regulation VII. of 1822, s. 9, it was local usages which had to be recorded: Circulars to Board of Revenue Officers, 1868 and 1870; *Returaji Dubain* v. *Pahlwan Bhagat.*(1) The signatures to the wajib-ul-arz of 1863 show that the village at that time was a purely Mahomedan village; this raises a presumption in favour of the custom, since among Mahomedans a right of pre-emption exists apart from any special custom: Ameer Ali's Mahomedan Law, vol. i, pp. 718, 720. The partition in 1906 did not determine the right of pre-emption among the sharers in the village. The partition was not a "perfect partition," since no new wajib-ul-arz was prepared: Act XIX. of 1873, ss. 3 and 107. Any co-sharer can obtain a partition, and it cannot be that the act of an individual sharer puts an end to the right among the body of co-sharers. The question of the effect of a partition upon an existing custom of pre-emption has been the subject of numerous decisions in the High Court of Allahabad. In the earlier decisions, e.g., *Gokal Singh* v. *Mannu Lal*(2), the view taken was that partition had no effect upon the right of pre-emption. Somewhat later the view was that a partition destroyed the custom: *Ghure* v. *Man Singh.*(3) In 1899 the question was considered by the Full Bench in *Dalganjan Singh* v. *Kalka Singh*(4), and the rule was laid down that each case depends upon its particular facts and must be separately considered. Since the above decision the question has again risen in *Janki* v. *Ram Partab Singh*(5), *Sardar Singh* v. *Izaz Husain Khan*(6), *Gobind Ram* v. *Masih-ullah Khan*(7), *Dori* v. *Jewan Ram*(8), and *Chephur* v. *Abdul Hakim.*(9) The

(1) (1910) I.L.R. 33 Allah. 196, at p. 217.
(2) (1885) I.L.R. 7 Allah. 772.
(3) (1895) I.L.R. 17 Allah. 226.
(4) I.L.R. 22 Allah. 1.
(5) (1905) I.L.R. 28 Allah. 286.
(6) (1906) I.L.R. 28 Allah. 614.
(7) (1907) I.L.R. 29 Allah. 295.
(8) (1910) I.L.R. 32 Allah. 265.
(9) (1910) I.L.R. 33 Allah. 296.

test which is to be collected from these authorities is whether or not conditions have arisen which make the custom inapplicable. In the present case the custom as recorded in the wajib-ul-araiz is applicable to the present circumstances, since it expressly gives the right to "the proprietors of the village." [Reference was made to Regulation VII. of 1822, s. 12, and to Wilson's Glossary, as to the meaning of "bhaiyachara" and "pattidar."] The view that the right of pre-emption is based upon a joint liability for revenue is erroneous; the object of the right is to keep strangers out of the village.

De Gruyther, K.C., and *Dube*, for the respondent. The decisions in *Ram Prasad* v. *Abdul Karim*(1) and *Jagdam Sahai* v. *Mahabir Prasad*(2) establish that where a custom of pre-emption exists the persons who are entitled to exercise it must be ascertained by reference to Mahomedan law unless that law is modified by the special custom proved. In matters of pre-emption Hindu law has adopted Mahomedan law as part of its system: *Jadu Lal Sahu* v. *Maharani Janki Koer.*(3) The right under Mahomedan law depends upon the pre-emptor being a co-sharer in the land: Hamilton's Hedaya, bk. 38, ch. 1 (Grady's edition, 1870, p. 548). The phrase "partner in the property" in that passage is rendered as "co-sharer" by all the commentators. It is this element of co-partnership, involving a joint and several liability for the revenue, upon which the right of pre-emption depends. When it ceases, either owing to a partition by Government or to a division by the sharers, the right ceases to exist: *Ganga Singh* v. *Chedi Lal*(4); *Digumber Misser* v. *Ram Lal Roy*(5); *Gopal Sahi* v. *Ojoodhcapershad*(6); *Joobray Singh* v. *Jookun Singh.*(7) In the present case no custom varying the Mahomedan law was proved, and the partition put an end to the right. The principle of the Full Bench case of *Dalganjan Singh* v. *Kalka Singh*(8) applies; the terms of the wajib-ul-arz in the present case make this an a fortiori case. Further, the view of the High Court that it was not

(1) (1887) I.L.R. 9 Allah. 513.
(2) (1905) I.L.R. 28 Allah. 60.
(3) (1912) L.R. 39 Ind. Ap. 101.
(4) (1911) I.L.R. 33 Allah. 605.
(5) (1887) I.L.R. 14 Cal. 761.
(6) (1865) 2 Suth. W.R. 47.
(7) (1871) 14 Suth. W.R. 476.
(8) I.L.R. 22 Allah. 1.

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an existing custom which was recorded, but an agreement between the sharers which came to an end upon the partition, was correct. The contents of a wajib-ul-arz must be received with caution as evidence to establish a custom: *Anant Singh* v. *Durga Singh* (1) [The following were also referred to: *Badri Prasad* v. *Hashmat Ali* (2); *Mathra Prasad* v. *Nemchand* (3); Thomason's Directions for Revenue Officers, 1858, pp. 1, 10, 50, 53 et seq., 237, and 249.]

Lowndes in reply. The argument based upon Mahomedan law was not advanced in any of the reported cases. In the passage cited from the Hedaya the first two classes of pre-emptors referred to are co-sharers, but in the third class it is assumed that a partition has taken place.

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Nov. 25.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. The suit in which this appeal has arisen was brought on August 6, 1910, in the Court of the Subordinate Judge of Aligarh by Digambar Singh, who is the appellant here, against Ahmad Said Khan, who is the respondent to this appeal, and one Bhawani Das, to enforce a right of pre-emption to which Digambar Singh claimed to be entitled, under a custom which he alleged to be prevailing in mauza Pala Kher in the district of Bulandshahr.

The respondent here, Ahmad Said Khan, who was the vendee of the property in dispute, by his written statement denied that there was any custom of pre-emption in mauza Pala Kher and alleged that "Mauza Pala Kher was divided by perfect partition and entirely separate mahals were formed . . . . After the said partition no connection of any kind was left among the co-sharers of the different mahals, nor did any joint right, based on the terms of any wajib-ul-arz, subsist among them."

The date of the sale in respect of which pre-emption is claimed was July 12, 1909. In 1905 mauza Pala Kher was, on the applications of certain of the then sharers in the mauza, partitioned into five mahals, of which two were named respectively Salig Ram and Bhawani Das. On the partition

(1) (1910) L.R. 37 Ind. Ap. 191, at p. 197.

(2) (1904) 1 Allah. L.J. 33.

(3) (1905) 2 Allah. L.J. 28.

each of the five newly formed mahals became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five mahals. No separate record of rights was before this suit framed for any of the five new mahals.

The property sought to be pre-empted is in mahal Bhawani Das, in which mahal the appellant had not a share at the date of the sale; he was, however, at that date a sharer in mahal Salig Ram, in which mahal neither the respondent nor his vendor, Bhawani Das, was a sharer. The respondent was not at the date of the sale a sharer in any of the five new mahals; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in mahal Bhawani Das. The appellant and Bhawani Das are not related to each other. The respondent, who is a Mahomedan, is not related to the appellant or to Bhawani Das. Prior to the partition of 1905 mauza Pala Kher was an unpartitioned mauza in which the appellant and Bhawani Das were sharers. Of the history of mauza Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the mauza were apparently Mahomedans.

The evidence to prove the custom of pre-emption upon which the appellant's claim is based consisted of extracts from a wajib-ul-arz of mauza Pala Kher of 1863, upon extracts from a wajib-ul-arz of the same mauza of 1870, and of a judgment of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose, of course, long anterior to the partition of mauza Pala Kher, but the judgments do afford evidence that there existed in mauza Pala Kher a custom of pre-emption under which a relation of a vendor, a sharer in the mauza, was entitled to pre-empt on a sale to a stranger to the mauza, but that is not the custom upon which the appellant must rely in this suit.

The extract from the wajib-ul-arz of mauza Pala Kher, which was prepared on June 16, 1863, as translated and so far as it is material is as follows: "In future every co-sharer mortgagor or mortgagee shall as such be at liberty to make transfers. But he shall make transfers first in favour of his own and ekjaddi

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brothers and after them in favour of co-sharers in the khata and patti as well as in favour of the proprietors of the village. If none of them take he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration it shall be decided by arbitration."

The wajib-ul-arz of 1863 was signed by all the sharers and by some, if not all, of the mortgagees.

The corresponding clause in the wajib-ul-arz of 1870, as translated in the record, is as follows: "In future co-sharer mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and ekjaddi brothers and next to co-sharers in the khata and patti as well as to proprietors. If none of the aforesaid persons takes he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less it shall be decided by arbitration."

In paragraph 14 of the wajib-ul-arz of 1870 it is expressly stated, "Custom as to pre-emption—Pre-emption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in mauza Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the mauza. It is to be presumed, as the contrary has not been shown, that the wajib-ul-arz of 1863 and the wajib-ul-arz of 1870 had been properly prepared in accordance with the law then in force, and with the "Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in mauza Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his ekjaddi brother and then to a sharer in the khata and patti, or to a proprietor in the mauza, and if they should refuse to purchase it he might assign it to a stranger, and in the same way if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses to which

they have referred to treat mortgagees as such as sharers in the mauza and to confer on them a right to pre-empt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before the Board does not show what was the vernacular word in the wajib-ul-araiz of 1863 and 1870, which has been translated as "co-sharer," or what was the vernacular word in the wajib-ul-arz of 1863 which has been translated as "village."

The wajib-ul-arz of 1863 contained a clause as to partition which, as translated in the record, was as follows:

"7. Partition, separate and compact. Every one can get his property partitioned to the extent of his share. And, if the area be compact, he can also get a separate mahal formed. If at the time of partition the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) give land of the same quality in exchange. As to a well, the costs of construction shall be given to the person who constructed it. If the khudkasht land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant."

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in mauza Pala Kher not only contemplated that the mauza might subsequently be partitioned into separate mahals, but also intended that on a partition off from the mauza of a separate mahal the sharers in the other mahals or in the unpartitioned portion of mauza Pala Kher should as such have no share or other proprietary interest in the separated mahal. It does not appear from the extracts from the wajib-ul-arz of 1870 which are printed in the record whether the wajib-ul-arz of 1870 contained a similar clause, but it probably did.

It appears from the rubakari of December 5, 1902, which was drawn up for the carrying out by the amin of the partition of mauza Pala Kher that the partition should be a perfect partition; that a grove should be allotted to the mahal of the person who

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had planted it; and that a Mahomedan tomb, which stood in the abadi, should be allotted to the share of the Mahomedan.

The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in mauza Pala Kher; that the partition of the mauza and the separation of the plaintiff's mahal Salig Ram from that of the vendor did not affect the custom of pre-emption; and that the plaintiff, the appellant here, had a right to pre-empt as against the vendee, the respondent here; and on March 28, 1911, he gave the appellant a decree for pre-emption. From that decree Ahmad Said Khan, the respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Tudball, J., before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

Pre-emption in village communities in British India had its origin in the Mahomedan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as is possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the appellant, existed in mauza Pala Kher is afforded by the clauses relating to pre-emption which are contained in the wajib-ul-araiz of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of mauza Pala Kher the custom of pre-emption, which is set out in the second paragraph of clause 2 of the plaint, existed and was in force in mauza Pala Kher, but that would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the wajib-ul-araiz or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza Pala Kher would survive a partition of that mauza into separate mahals so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh* v. *Kalka Singh*(1), in which Sir Arthur Strachey, C.J. and Banerji, J. considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case as in this no new wajib-ul-arz was framed on the partition. Their Lordships are not prepared to dissent from the view of Banerji, J. in the case which has been referred to, that "where a fresh wajib-ul-arz has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation." The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in mauza Pala Kher were Mahomedans; that Hindus were obtaining interests in the mauza as mortgagees; and that the sharers in 1863 were contemplating that the mauza might be partitioned. The right to obtain perfect

(1) I.L.R. 22 Allah. 1.

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partition, of course, existed. Nor can their Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in mauza Pala Kher, and that nothing was done on partition to provide that sharers in one mahal should have a right of pre-emption in respect of a sale in another mahal in which they were not sharers. Their Lordships are unable to draw the inference from the wajib-ul-araiz and the circumstances in this case that it was intended that, in case of a perfect partition of mauza Pala Kher, a sharer in one mahal should have a right of pre-emption in another mahal in which he was not a sharer.

The learned judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the wajib-ul-araiz of 1863 and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a wajib-ul-arz as evidence of a custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the wajib-ul-araiz of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in mauza Pala Kher. These clauses were inartistically drafted. The kanungo or other official who collected information from the sharers in the mauza may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the wajib-ul-araiz were signed by the sharers or sanctioned by the settlement officer the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their mauza was. Pre-emption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst shareholders in very many, if not in most or all, of the village communities in the province in which mauza Pala Kher is situate.

In agreeing as to the custom of pre-emption which should be inserted in the wajib-ul-araiz the sharers were not trying to establish any rule of inheritance in the mauza inconsistent with the Mahomedan or the Hindu law of inheritance, and their Lordships fail to see on what principle statements in a wajib-ul-arz as to rights of pre-emption, which are not in contravention of Mahomedan, Hindu, or other law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a wajib-ul-arz is not by itself good prima facie evidence of a custom of pre-emption which is stated in it and that the wajib-ul-arz requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a wajib-ul-arz may be rebutted by other evidence.

The appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *Douglas Grant.*

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Nov. 2, 25.

JAMBU PARSHAD . . . . . APPELLANT;

AND

MUHAMMAD AFTAB ALI KHAN AND ANOTHER . . . . . } RESPONDENTS.

AND CONSOLIDATED APPEAL.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Registration of Document—Presentation by Agent—Absence of Power of Attorney—Certificate invalid—Registration Act (III. of 1877), ss. 32, 33, 49, and 60.

When a document is presented for registration under the Registration Act, 1877, by an agent who is not authorized by a power of attorney in accordance with ss. 32 and 33 of that Act, the registering officer has no jurisdiction to register the document, nor to indorse thereon a certificate under s. 60. Mortgagors who attend before the registering officer for the purpose of admitting its execution under s. 34 cannot be regarded, for the purpose of s. 32, as having presented the mortgage deed for registration, nor does their admission of execution cure a defect in the presentation.

CONSOLIDATED APPEALS from two judgments and decrees of the High Court (February 13, 1912), one of which confirmed and the other partly confirmed a decree of the Subordinate Judge of Saharanpur (September 26, 1910).

The question for determination in the appeals was whether two mortgages, dated respectively July 2, 1882, and August 10, 1886, had been duly registered under the Registration Act (III. of 1877).

The mortgage dated July 2, 1882, was executed by Nawab Saiyid Muhammad Khan and Muhammad Ilyas Khan in favour of Lala Mitter Sen.

The mortgage dated August 10, 1886, was executed by the said Nawab Saiyid Muhammad Khan, Muhammad Khurshed Ali Khan, and the first respondent also in favour of Lala Mitter Sen.

**Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

There was a third mortgage dated October 25, 1892, which was not the subject of the present appeal.

The appellant instituted two suits against the respondent, the first to enforce the mortgage of 1886, and the second to enforce the mortgages of 1882 and 1892.

The first respondent, by an amendment of his written statement, pleaded that the mortgages sued on were not presented for registration by a competent person, and that the sub-registrar had no jurisdiction to register them.

The provisions of the Registration Act, 1877, with regard to the presentation of a document for registration under the Act are contained in ss. 32 and 33, which, so far as material, are set out in the judgment of their Lordships.

The indorsement of the registering officer upon the deed of July 2, 1882, was as follows:—

"This document was presented in the office of the sub-registrar at tahsil Saharanpur on Tuesday, July 11, 1882, at 3 P.M.

"(sd.) Natthu Mal, general attorney of Lala Mitter Sen.

"(Signature of sub-registrar)

"Nawab Saiyid Muhammad Khan, aged 50 years, and Muhammad Ilyas Khan, aged 35 years" (here followed particulars of identification), "admitted the execution of this document and received at this time in my presence the sum of Rs. 59,000 in cash as per detail given in this document.

"Dated July 3, 1882."

Then followed the signature of the sub-registrar and that of the mortgagors.

The indorsement upon the mortgage of August 10, 1886, was in similar terms, except that "Ilahi Bakhsh, general attorney of Lala Mitter Sen," signed as presenting the document.

The respondents called as a witness the sub-registrar, who produced the register of powers of attorney which contained a power of attorney by Lala Mitter Sen in favour of Natthu Mal dated June 19, 1882, and one in favour of Ilahi Bakhsh dated February 17, 1885. These powers of attorney, however, did not authorize them to present the documents in question for registration.

The Subordinate Judge dismissed the suits, holding that the

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documents had not been presented by duly authorized agents within ss. 32 and 33 of the Registration Act, 1877.

The High Court (Sir H. Griffen, J. and Chamier, J.), by its judgment delivered on February 12, 1912, affirmed the judgment of the Subordinate Judge so far as it related to the mortgages of July 2, 1882, and August 10, 1886. The learned judges were of opinion that the certificates of registration indorsed upon them raised a strong presumption that they were duly registered, but that this presumption was rebutted by the evidence. They rejected the argument that the executants could be regarded as the persons presenting the documents for registration, and held that the admission of the mortgagors under s. 34 did not dispense with a strict fulfilment with the provisions of ss. 32 and 33 of the Registration Act, 1877.

The proceedings upon the appeal to the High Court are reported at I.L.R. 34 Allah. 331.

De Gruyther, K.C., and *O'Gorman*, for the appellant. An indorsed certificate of the registering officer under s. 60 of the Act is conclusive that the document to which it relates has been duly registered and renders it admissible in evidence: *Sah Mukhun Lall Panday* v. *Sah Koondun Lall*(1); *Mohammed Ewaz* v. *Birj Lall*(2). This is so at any rate where, as in the present case, ss. 34, 35, 58 and 59, referred to in s. 60, have been complied with. Sect. 49 must be regarded as being controlled by s. 60; a document whose registration is certified under s. 60 is a registered document within s. 49. If compliance with s. 32 is essential, it may be inferred from the indorsements that the executants were present at the time of the presentation of the documents, and it should be presumed that they presented or joined in presenting them. In the circumstances it is not material by whose hand the documents were handed to the registering officer. In any event there was a mere irregularity of procedure by the sub-registrar, and by s. 87 that does not invalidate his certificate. *Mujibunnissa* v. *Abdul Rahim*(3) is distinguishable, as in that case it was clear that the person presenting the

(1) (1875) L.R. 2 Ind. Ap. 210. (2) (1877) L.R. 4 Ind. Ap. 166.
(3) (1900) L.R. 28 Ind. Ap. 15.

document had no authority at all in connection with it. The statement in the judgment of the Board that "the power and jurisdiction of the registrar only come into play when it is invoked by some person having a direct relation to the deed" must be read in reference to the particular facts of that case and not as a proposition of general application: *Quinn* v. *Leathem*.(1) In *Ishri Prasad* v. *Baijnath*(2) there was no person before the registering officer who was competent to present the document. Since the decision of the present case the High Court has decided two appeals upon very similar facts, namely, *Karta Kishan* v. *Harnam Chand*(3) and *Atma Ram* v. *Agra Sen*.(4) Neither of those decisions is consistent with the decision in the present case. [*Isak Mahamad* v. *Bai Katija*(5) and *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu*(6) were also referred to.]

Lowndes, for the respondents. The registration was invalid since the persons presenting the deeds were not properly authorized to do so by power of attorney as required by ss. 32 and 33 of the Act. The decision in *Mujibunnissa* v. *Abdul Rahim*(7) is conclusive that strict compliance with those sections is a condition precedent to any jurisdiction in the registering officer to grant a certificate. Under s. 49 the deeds were inadmissible in evidence. The defect was not one of procedure but of substance, as it went to the jurisdiction of the sub-registrar. The executants did not give evidence at the trial, and it cannot be inferred from the indorsements that they were present at the time when the deeds were presented; moreover the indorsements show that the persons presenting the documents purported to act as agents for the mortgagee.

De Gruyther, K.C., replied.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. These are consolidated appeals from two decrees, dated February 13, 1912, of the High Court of Judicature at Allahabad, one of which affirmed a decree of the Subordinate Judge of Saharanpur of September 26, 1910, and

(1) [1901] A.C. 495 at p. 506.
(2) (1906) I.L.R. 28 Allah. 707.
(3) (1912) I.L.R. 35 Allah. 72.
(4) (1912) I.L.R. 35 Allah. 134.
(5) (1879) I.L.R. 6 Bomb. 96.
(6) (1881) I.L.R. 6 Calc. 25.
(7) L.R. 28 Ind. Ap. 15.

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the other of which partly affirmed and partly reversed a decree of the same Subordinate Judge of that date. The suits in which the decrees were made were brought in the Court of the Subordinate Judge of Saharanpur, one on May 20, 1909, and the other on March 16, 1910. They were suits for sale of immovable property. The suit of 1909 was based on a mortgage deed of August 10, 1886, the consideration for the mortgage having been Rs. 7000. The suit of 1910 was based on a mortgage deed of July 2, 1882, the consideration for that mortgage deed having been Rs. 59,000, and upon a mortgage deed of October 25, 1892. There was in each suit a claim for a money decree. The Subordinate Judge dismissed the suits on the grounds that the mortgage deeds had not been validly registered, and consequently could not affect the immovable property which was comprised in the mortgages, and that claims for money decrees were time-barred. On appeal to the High Court at Allahabad, the High Court dismissed the appeal in the suit of 1909, which was based on the mortgage of 1886, dismissed the appeal in the suit of 1910 so far as it related to the mortgage of 1882, and allowed the appeal in that suit so far as it related to the mortgage of 1892. These consolidated appeals are from the decrees of dismissal. The plaintiff in the suits is the appellant here. The respondents have been defendants in these suits, and one of them is the representative of a deceased defendant.

The only questions which have to be considered in these consolidated appeals are whether the mortgage deed dated July 2, 1882, and the mortgage deed dated August 10, 1886, were validly registered under Act III. of 1877. They were documents which were required by s. 17 of that Act to be registered. If they were not validly registered they could not, by reason of s. 49 of that Act, affect any immovable property comprised in them, or be received as evidence of any transaction affecting such property. Further, if the documents of 1882 and 1886 were not validly registered instruments, no mortgage could, by reason of the first paragraph of s. 59 of Act IV. of 1882, be effected by them. They were in fact registered, but the question is, was the registration a valid registration? The Subordinate Judge and the High Court found that there was no valid registration in either case.

In s. 32 of Act III. of 1877 it is enacted that: "Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

"by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

"or by the representative or assign of such person,

"or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

So far as is material to the decision of these appeals, it is in s. 33 of Act III. of 1877 enacted: "For the purposes of section 32 the powers-of-attorney next hereinafter mentioned shall alone be recognised (that is to say):—

"(*a*) If the principal at the time of executing the power-of-attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the registrar or sub-registrar within whose district or sub-district the principal resides."

The mortgage deed of July 2, 1882, was presented for registration on July 11, 1882, at Saharanpur at the proper registration office on behalf of Lala Mitter Sen, the mortgagee, by one Natthu Mal, who held a power-of-attorney, of June 19, 1882, from Lala Mitter Sen, which, however, did not empower Natthu Mal to present documents for registration. Lala Mitter Sen lived at Saharanpur, and the power-of-attorney had been duly authenticated by the then sub-registrar of Saharanpur on June 19, 1882, but apparently it had not been executed before the registrar or the sub-registrar. The sub-registrar's note to the copy of the power-of-attorney in the register merely states that Lala Mitter Sen was known to him, and admitted the execution and completion of the document. It has not been proved that Natthu Mal held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the sub-registrar of Saharanpur, on July 11, 1882, the execution and completion of the mortgage deed, and received in his presence the mortgage money, Rs. 59,000,

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and thereupon the sub-registrar registered the mortgage deed.

The mortgage deed of August 10, 1886, was presented for registration on September 9, 1886, at Saharanpur, at the proper registration office, on behalf of Lala Mitter Sen, the mortgagee, by one Ilahi Bakhsh, who held a power-of-attorney of February 17, 1885, from Lala Mitter Sen, which, however, did not empower Ilahi Bakhsh to present documents for registration. This power-of-attorney had not been authenticated by the registrar or the sub-registrar of Saharanpur, and it does not appear that it had been executed by Lala Mitter Sen before either of those officials. It has not been proved that Ilahi Bakhsh held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the sub-registrar of Saharanpur, on September 9, 1886, the execution and completion of the mortgage deed of August 10, 1886, and acknowledged the receipt by them of the mortgage money, Rs. 7000, and thereupon the sub-registrar registered the mortgage deed.

It was contended on behalf of the appellant here that it might be presumed that the mortgage deeds had been presented for registration by the mortgagors who had executed the deeds, and who attended before the sub-registrar. It is, however, obvious that the mortgagors had attended at the office of the sub-registrar to admit that they had executed the deeds and not to present them for registration, and that they did not present them for registration. The mortgagors attended to enable the sub-registrar to comply with ss. 34 and 35 of Act III. of 1877 by satisfying himself that they had executed the deeds. In the one case the deed was presented for registration by Natthu Mal, an agent of the mortgagee, and in the other case the deed was presented for registration by Ilahi Bakhsh, another agent of the mortgagee, and in neither case did the agent hold such a power-of-attorney as was necessary to enable a valid registration to be made.

It was decided, and as their Lordships consider correctly, by Sir John Stanley, C.J. and Sir George Knox, J. in 1906, in *Ishri Prasad* v. *Baijnath* (1), that the terms of ss. 33 and 33 of Act III.

(1) I.L.R. 28 Allah. 707.

of 1877 are imperative, and that a presentation of a document for registration by an agent, in that case the agent of a vendee of immovable property, who has not been duly authorized in accordance with those sections, does not give to the registering officer the indispensable foundation of his authority to register the document. As those learned judges said, "His (the sub-registrar's) jurisdiction only comes into force if and when a document is presented to him in accordance with law."

These learned judges also rightly decided in the same case that the fact that the sub-registrar had summoned before him the executant of the deed, who was the vendor, and had obtained his consent to the registration of the deed, did not give the sub-registrar jurisdiction to register it, and that the omission of the registering officer to notice that the power-of-attorney under which the agent had presented the sale deed for registration had not been executed or authenticated in accordance with s. 33 of Act III. of 1877 could not be regarded as a defect in procedure within the meaning of s. 87 of that Act.

Although the facts in these consolidated appeals are not the same as were the facts in *Mujibunnissa* v. *Abdul Rahim*(1), their Lordships consider that the principle which this Board applied in that case is applicable here. That principle, in their Lordships' opinion, is that a registrar or sub-registrar under Act III. of 1877 has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it, or by the representative or assign of such person, or by an agent of such person, representative, or assign, duly authorised by a power-of-attorney executed and authenticated in manner prescribed in s. 33 of that Act. It is obvious that executants of a deed who attend a registrar or sub-registrar merely to admit that they have executed it cannot be treated, for the purposes of s. 32 of Act III. of 1877, as presenting the deed for registration. They no doubt would be assenting to the registration, but that would not be sufficient to give the registrar jurisdiction.

One object of ss. 32, 33, 34 and 35 of Act III. of 1877 was to make it difficult for persons to commit frauds by means of registration under the Act. It is the duty of Courts in India not

(1) L.R. 28 Ind. Ap. 15.

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to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorized in the manner prescribed by the Act to present it.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Ranken Ford, Ford & Chester.*

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SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } APPELLANT;

AND

KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA . . . . . } RESPONDENT.

AND CONNECTED APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Chaukidari Chakaran Lands—Right of Government to assess—"Lands assigned"—Bengal Regulation I. of 1793, *s.* 8—*Bengal Regulation VIII. of* 1793, *s.* 41—*Village-Chaukidari Act* (*Bengal Act VI. of* 1870), *s.* 1.

Two zamindaris were held under sanads granted in 1803 and confirmed by Regulation XII. of 1805, the grantees being thereby required to maintain peace and order within their zamindaris. The zamindars employed chaukidars, to whom they, of their own free will, assigned lands which were changed from time to time. There was nothing to show that when the zamindari estates were settled any part of the land was excluded from assessment as chaukidari lands:—

Held, that the word "assigned" in the definition contained in s. 1 of the Village-Chaukidari Act, 1870, means assigned by Government, or appropriated by its authority or permission with the power of resumption, and that the provisions of that Act do not apply to lands assigned to chaukidars by a zamindar under the circumstances of the present appeals.

CONSOLIDATED APPEALS from two judgments and decrees of the High Court (March 23, 1910) reversing judgments and

* *Present*: LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

decrees of the Subordinate Judge and the Additional Subordinate Judge of Cuttack (May 27, 1907, and September 11, 1906, respectively).

The principal question in the appeals was whether certain lands in Orissa were chaukidari chakaran lands within the meaning of the Village-Chaukidari Act, 1870 (Bengal Act VI. of 1870), and were consequently subject to an assessment under the provisions of that Act.

The facts are fully stated in the judgment of their Lordships, in which the material sections of the Act are fully set out. The suits were instituted by the respondents, the plaintiff in each case claiming a declaration that the lands to which the suit related were not chaukidari chakaran lands within the meaning of the above mentioned Act, and that the Collector of Cuttack, acting on behalf of the defendant (the present appellant), had no jurisdiction to transfer or to assess the lands under the provisions of that Act.

The Subordinate Judge held in both suits that the lands were chaukidari chakaran lands within the meaning of the Act, and that the proceedings of the Collector were valid and regular.

The High Court (Woodroffe and Caspersz, JJ.), by judgments delivered in both suits on March 23, 1910, allowed the appeals. Woodroffe, J. in the course of his judgment in the first appeal said: "Under s. 41 of Regulation VIII. of 1793 chakaran lands were declared not meant to be included in the exception contained in s. 36. The whole of these lands were annexed to the malguzari lands and declared responsible for the public revenue assessed on the zamindaris in which they were included. These chakaran lands were, however, not assessed in the revenue, and were not taken into account in assessing the revenue on the estate of which they formed a part. That being so, the introduction of the Village-Chaukidari Act, 1870, did not, as regards lands so settled, affect in any way the terms of the original settlement. This is not, however, the case here. Prior to the sanad granted by the British Government the plaintiff held his estate under the Mahrattas at a fixed rent. There was no settlement of the estate by that Government, which thereby merely confirmed, by s. 33 of Regulation XII. of 1805, the

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sanads granted by the British Commissioners which themselves confirmed the terms on which the estate was held under the Mahrattas. In any case there is nothing to show that the chaukidari chakaran lands were excluded from assessment when the estate was settled or confirmed by the British Commissioners." Capersz, J. delivered judgment to the same effect.

Sir Erle Richards, K.C., and *Dunne*, for the appellant. The chaukidari lands in question in the suits are subject to the provisions of the Village-Chaukidari Act, 1870, and are assessable under s. 49 of that Act. In the definition, in s. 1 of the Act, of the chaukidari chakaran lands to which the Act applies the word "assigned" means assigned whether by Government or by the zamindar. If it had been intended to restrict the operation of the Act in the manner contended for the definition would have referred to lands which have been permanently settled. The language of the definition is clear, and no reservation in favour of lands not included in the assessment of revenue can be implied. The assessment to be made under s. 49 of the Act is not really land revenue, but is similar to public road cess which has to be paid in addition to land revenue. [Regulation XII. of 1805, s. 33, Regulation XIII. of 1805, s. 13, and Regulation XX. of 1817, s. 21, were referred to.]

De Gruyther, K.C., and *Dube*, for the respondents. The effect of the definition in the Act is to confine its operation to lands assigned by the Government as chaukidari lands. The sanads of 1803 which were confirmed by Regulation XII. of 1805, s. 33, imposed no obligation upon the zamindars to set aside any land for the chaukidars, and there is no evidence that any part of the zamindari estates were excluded from the assessment of revenue on account of chakaran lands. The onus upon this point was upon the appellant. The lands in question were allotted by the zamindars of their own free will for the maintenance of chaukidars whom they appointed. The provision by s. 48 for the transfer of land to which the Act applies to the zamindar shows that it does not apply to land settled by the zamindar, and this is borne out by the form of transfer in Sched. C. The intention of the Act was that where its effect was to add to the

zamindar's estate an assessment should be imposed, but not otherwise. This view is supported by a consideration of the history of chaukidari tenures in Bengal. [*Raja Lelanund Singh Bahadoor* v. *Government of Bengal*(1); Regulation I. of 1793, s.8; Regulation VIII. of 1793, s.41; Toynbee's History of Orissa from 1803 to 1828, appendix, pp. 165 et seq.; Harington's Analysis, vol. ii., pp. 235 and 236, and McNeele's Report on the Village Watch in Lower Bengal were referred to.] Further, the notification published by Government in 1899, extending the application of the Act to Orissa, in which district these zamindaris are situated, shows that the Government assumed that the Act applied only to jagirs granted by Government, and that the policy of the Act was based upon the Government's right to resume the lands to which it applied: Notification of May 25, 1899, clauses 3, 4, and 6.

Sir Erle Richards, K.C., replied.

The judgment of their Lordships was delivered by

MR. AMEER ALI. The plaintiffs in the two actions which have given rise to the present appeals are respectively the zamindars of Sukinda and Madhupur in the Province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI. of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgments of the High Court, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the province. Orissa consists of three well-defined tracts; in the middle lies a level open country

(1) (1855) 6 Moo. Ind. Ap. 101.

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inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the Mogulbandi, which is defined in Regulation XII. of 1805 as "being that part of the district of the zillah of Cuttack in which, according to established usage, as in Bengal, the land itself is responsible for the payment of the public revenue, and in which every landholder holds his land subject to the conditions of that usage."

The wild and hilly tract on the west and the low marshy lands along the sea-shore to the east were held by a number of chiefs who, under the designation of rajas, zamindars, and khandaits, were allowed to exercise a feudal sway in their respective jagirs on payment of a fixed tribute to the Imperial Government. These outlying parts of the province were usually called the Rajwara.

The zamindaris of Sukinda and Madhupur lay within the Rajwara and outside the Mogulbandi territories.

Shortly before the acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the Rajwara, and thus, when the Company obtained the virtual government of Bengal, Behar, and Orissa, under Shah Allam's grant, the de facto British possession of the latter province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803 the Mahratta Raghoji Bhonslay, who held Southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the zamindars of Sukinda and Madhupur, to whom sanads were granted entitling them to hold their estates at a fixed jama in perpetuity. These two zamindaris were then brought within the

Mogulbandi and subjected to the general regulations in force in Bengal.

Later in the year came the Treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or kaulnamas were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The zamindar of Sukinda alleged in his suit that he also held under a kaulnama, but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a sanad granted to, him by the Commissioners, the terms of which will be referred to in the course of this judgment. By s. 33 of Bengal Regulation XII. of 1805 statutory confirmation was given to the sanads of the two plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the plaintiffs' ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The plaintiffs accordingly urge that the Collector representing the defendant has no right to exercise in respect of these lands the powers he claims under the Bengal Act VI. of 1870. The basis of his contentions will appear clearly when the course of legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or quasi-public duties by grants of lands to be held either rent-free or at a reduced rent. One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas. These lands are commonly known as chaukidari chakaran lands, from the word chaukidar, which means "a watchman," and chakaran, "service."

The history of these chaukidari grants is set out with considerable lucidity in Lord Kingsdown's judgment in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan*.[1] The following passage explains the origin of the system and the shape it assumed after the decennial settlement of 1789 and the

(1) (1864) 10 Moo. Ind. Ap. 16.

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permanent settlement of 1793. "It appears that these zamindars were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of tannahdars, or a general police force, and other officers in great numbers, under the name of chaukidars, paiks, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the zamindar, the collection of his revenue and other services personal to the zamindar. All these different officers were at that time the servants of the zamindar, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

"The lands so enjoyed were called chakaran or service lands. These lands were of great extent in Bengal at the time of the decennial settlement, and the effect of that settlement was to divide them into two classes:—

"First. Tannahdari lands, which, by Ben. Reg. I. of 1793, s. 8, cl. 4, were made resumable by the Government; the Government taking upon itself the maintenance of the general police force and relieving the zamindar from that expense.

"Second. All other chakaran lands, which by Ben. Reg. VIII. of 1793, s. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the malguzari lands and declared responsible for the public revenue assessed on the zamindars' independent taluqs or other estates, in which they were included in common with all other malguzari lands therein."

Later on Lord Kingsdown explains the nature of the lands that were held by chaukidars in lieu of wages. Paraphrasing cl. 4, s. 8, of Regulation I. of 1793, and s. 41 of Regulation VIII. of 1793, he says: "They were not to be included in the malguzari lands for the purpose of increasing the jama, because the zamindars had not the full benefit of them, but they were to be included in the malguzari lands for the purpose of securing the

assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest."

It is clear from the language of cl. 4, s. 8, of Regulation I. of 1793, and of s. 41 of Regulation VIII. of the same year, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the zamindar with the permission or under the authority of Government for the purpose of remunerating the chaukidars for their services, lands which, although included in the mahal and "annexed" to the malguzari lands, were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets.

Here it becomes necessary to notice the sanad that was granted to the zamindar of Sukinda in 1804, an attested copy of which is in the record. A sanad was also granted to the zamindar of Madhupur; it apparently has been lost, but it may be assumed that it was to the same effect as the zamindar of Sukinda's sanad, the attested copy of which is, so far as is material, as follows: "As the duties of the zamindar of the said killa have from before been entrusted to Dhrubjoy Bhupati Harichandan, the zamindar, the zamindari of the said killa has been bestowed upon and given to the said zamindar by the Government of the East India Company; you shall regard the said person as the permanent zamindar of the said killa, and shall not act against his orders, instructions, and advice, and shall not conceal and keep secret any matter whatsoever from him. The said zamindar shall discharge the duties attached to the said zamindari in proper manner, and collect rent from the said zamindari in the best way according to the laws of the Government, and he shall without any objection pay into the Government Treasury 5500 kahan cowris, the fixed annual amount payable to the Government, in proper time and according to proper instalments. He shall keep the tenants and the people in general satisfied and pleased by good treatment, and shall make such exertions and attempts as to make the zamindari improve and prosper, and he shall be so careful and vigilant that swords, guns, and other war weapons and

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ammunition may not be manufactured in the said zamindari, and that theft, robberies at night, and highway robberies may not be committed at any place; and in case such occurrence takes place, he shall arrest the thieves with stolen property and send them up to the Huzur (Government officers) for trial."

It will be observed that the sanad imposes on the zamindar the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such occurrence," of arresting the offenders and "sending them for trial." But it makes no provision regarding the machinery he was to employ for the purpose. The evident inference is that the Government was content to leave to the zamindar the manner in which he was to discharge the duty of maintaining peace and order in his zamindari. The Government obviously made no provision therefor. Regulation XIII. of 1805, which was enacted "for the maintenance of the peace and for the support and administration of the police in the zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of s. 5, relate to the zamindaris of Sukinda and Madhupur, the settlement of which, as already stated, had been made by special sanads.

The subsequent enactments before the Act of 1870 passed with the object of regularizing or improving the rural police are not material to this judgment. It is sufficient to say that the system under which the village chaukidars, as a part of the police machinery, held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural police or village chaukidars under the direct control of the State.

The preamble to the Act states the object with which it was enacted. Sect. 1 defines chaukidari chakaran lands thus: "The words 'chaukidari chakaran lands' shall mean lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police, and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zamindar."

The Act then lays down rules for the constitution of village panchayats or committees whose powers and duties are defined in considerable detail. In Part II. it proceeds to deal with the chaukidari chakaran lands.

Sects. 48, 49, and 50 form the most material provisions of the statute for the purposes of the present discussion. They run as follows:—

"48. All chaukidari chakaran lands before the passing of this Act assigned for the benefit of any village in which a panchayat shall be appointed shall be transferred in manner and subject as hereinafter mentioned to the zamindar of the estate or tenure within which may be situate such lands.

"49. All lands so transferred shall be subject to an assessment which shall be fixed at one-half of the annual value of such land according to the average rates of letting land similar in quality in the neighbourhood of such land, and such assessment shall be made by the panchayat of the village.

"50. Such assessment when made by the panchayat shall be submitted to the Collector of the district, and he or any other officer exercising the powers of a Collector by him thereunto appointed may approve, or revise and approve, the same (provided that it shall be lawful for the zamindar to contest the assessment before it is so approved), and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule C, transfer to such zamindar such land subject to the assessment so approved."

Sect. 51 declares that the order of transfer made under s. 50 shall operate to transfer the land to such zamindar subject to the assessment and subject to the rights of third parties.

Sect. 52 declares that the amount of the assessment shall be a permanent charge on the land; and the subsequent sections provide how it is to be realized in case of default of payment.

Sect. 58 empowers the Lieutenant-Governor to appoint commissions "to ascertain and determine the chaukidari chakaran lands and other lands before the passing of this Act assigned for the maintenance of an officer to keep watch in any village and to report crime to the police in such district."

But for the contentions, to which their Lordships will advert

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later, that have been advanced on behalf of the appellant, the Secretary of State for India, it would not have been necessary to give in extenso the above sections.

Bengal Act VI. of 1870 was, when enacted, not introduced into Orissa; its operation was confined to Bengal, where the category of lands referred to in Lord Kingsdown's judgment largely existed.

In 1899 the Act was, by a resolution of the Government of Bengal, dated February 9, 1897, extended to Orissa.

It appears that the plaintiffs, the zamindars of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates, retained in their service a large number of chaukidars whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these chaukidars was kept in the zamindari office, and it would appear that in the appointment of the chaukidars in more than one instance the Government police officer had a voice. But the records show that the zamindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two zamindaris when the Act was made applicable to Orissa.

Shortly after its extension the Collector of the Cuttack district proceeded to apply its provisions to the lands held by the chaukidars of Sukinda and Madhupur respectively, on the ground that they were chaukidari chakaran lands within the meaning of the Act. The plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the chaukidars who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of ss. 54 and 55 of the Act.

The plaintiffs thereupon brought these actions in the Court of the Subordinate Judge of Cuttack, in substance, for a declaration

that the Act did not apply to the lands in suit, and for an injunction restraining the defendant appellant from interfering with them.

The two suits were tried by two different Subordinate Judges, who, affirming the contention of the Collector that the lands in dispute were chaukidari chakaran lands, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned judges of the High Court were in error in referring to the previous legislation in order to construe Bengal Act VI. of 1870; that the Act was applicable to all lands whether "assigned" by Government or by the zamindar for the maintenance of chaukidars; and that the onus was on the plaintiffs to show that they were not chaukidari chakaran lands.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors.

The respondents are the zamindars, and "as such they have the prima facie title," to use the language of this Board in the well known case of *Rajah Sahib Perhlad Sein*(1), to the full enjoyment of every parcel of land within their zamindaris for which they pay revenue to Government.

It rests on the defendant to show that when the zamindaris were confirmed to the plaintiffs' ancestors the confirmation was subject to reservations which gave Government the power of resuming and assessing part of the land. That onus the defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old regulations in respect of lands which had been set apart by the zamindars with its permission or under its authority.

In Regulation I. of 1793 the word used is "appropriated"; in Regulation XIII. of 1805 the expression "assigned" is employed; but in both statutes the characteristics of the grants under which

(1) (1869) 12 Moo. Ind. Ap. 289, at p. 331.

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the lands were held depend on the implied authorization of the Government which excluded them from consideration in the adjustment of the jama of the mahal. In the preseent case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zamindaris. They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Bengal Act VI. of 1870 means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form of the "transferring order" in Sched. C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for the maintenance of the chaukidars and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden their judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says: "As already remarked, the chaukidari jagirs are State grants. They are excluded in the temporarily-settled estates from the settlements made with the zamindars, while in the permanently-settled estates they cannot be legally interfered with by the zamindars. The latter have thus in both classes of estates no connection with the jagir lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the chaukidars. Their liability is to contribute to any funds raised in the same manner as other

residents of the villages. Nor is it binding on the Government to continue the jagir grants for all time."

In the orders that are passed, a distinction is made with regard to the chaukidari holdings in the temporarily settled tracts and those situated in "permanently-settled estates." With regard to these it is declared that on resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view that the Act was designed to deal with lands which, although lying within a mahal, did not form a part of its assets, which is not the case with the zamindaris of Sukinda and Madhupur.

Their Lordships are of opinion that the judgments and decrees of the High Court should be affirmed and these appeals dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *The Solicitor, India Office.*
Solicitors for respondents: *Barrow, Rogers & Nevill.*

J. C.* 1914 Oct. 28, 29; Nov. 18.

HAMABAI FRAMJEE PETIT . . . . . APPELLANT;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . RESPONDENT.

MOOSA HAJEE HASSAM AND OTHERS . . . APPELLANTS;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Public Purpose—Provision of Residences for Government Officers—Right to resume Possession—Conditions of Lease and Sanad.

In order to constitute a "public purpose" in taking land it is not necessary that the land when taken is to be made available to the public at large.

The Government had, under a lease and a sanad, a right, subject to giving notice and paying compensation, to resume possession of the land granted if they desired to use it for a public purpose. The Government gave notice of their intention to resume possession with the object of using the land for the provision of residences to be let at moderate rentals to Government officers:—

Held, that the use to which it was proposed to put the land was a "public purpose" within the meaning of the lease and sanad.

APPEALS from two decrees of the High Court (September 5, 1911) affirming decrees of Beaman, J. (April 11, 1910).

The appeals depended upon the determination of substantially the same question and were heard together.

The suits were instituted by the respondent in the High Court to recover possession of certain lands situated upon Malabar Hill, Bombay. The land in suit in the first appeal had been leased by the East India Company in 1854 for a term of ninety-nine years with a proviso that "in case the said Company shall for any public purpose be at any time desirous to resume possession of the premises" they should be at liberty to re-enter, subject to giving the notice and compensation thereby provided.

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and MR. AMEER ALI.

The land in suit in the second appeal was granted by a sanad in 1839 at a small annual rent subject to a stipulation, "the said ground to be at any time resumable by Government for public purposes" upon notice and payment of compensation.

In 1908 the Government of Bombay gave notice that they desired to resume possession of the land held under the lease and sanad for a public purpose, stating in reply to an inquiry as to the purpose intended that they proposed to utilize the land for the residence of Government officers. The compensation payable under the lease and sanad respectively was duly ascertained. The respondents, however, refused to accept or agree to the valuations, and declined to give up possession. The suits were thereupon instituted.

Both suits were tried before Beaman, J. At the trials evidence, which was common to both suits, was given that the intention of the Government was to erect residences on the land and to offer them at moderate rents to Government officers; that owing to the dearth of suitable houses in Bombay and the high rents demanded officials were reluctant to accept appointments there, and that this was prejudicial to the efficiency of the various public services. No order or resolution of the Government was put in evidence.

The learned judge delivered judgment for the plaintiff (respondent) in both suits and made decrees for delivery of possession.

The High Court (Chandavarkar and Batchelor, JJ.) affirmed these decisions.

De Gruyther, K.C., and *McCardie*, for the appellant in the first appeal; *De Gruyther, K.C.*, and *Kenworthy Brown*, for the appellants in the second appeal. The purpose for which it is proposed to use the land is not a public purpose within the meaning of the lease and sanad. The true test is that there must be an intention to change the nature of the occupation from a private to a public occupation, and to render the land available to the public at large. Every act of Government, as a Government, is for a public purpose, but in this lease and sanad the expression must be given a more limited meaning. If this

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is not so the lease, which purports to be for ninety-nine years subject to the proviso, would in effect be determinable at will. To resume possession with the object of raising the rents and increasing the public revenue would be a public purpose in the wide sense, but it would not be a public purpose within the meaning and intention of the grants as appearing from their terms. [Land Acquisition Act (I. of 1894), s. 6, and *Shastri Ramchandra* v. *Ahmedabad Municipality*(1) were referred to.]

Sir Erle Richards, K.C., and *Dunne*, for the respondent in both appeals, were not called upon.

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The judgment of their Lordships was delivered by

LORD DUNEDIN. The same general point is raised in these two appeals.

The first appellant was lessee under the Government as successors of the East Indian Company under a lease of date April 18, 1854, which lease contained a power of resumption in favour of the lessor if "the Company, their successors or assigns, shall, for any public purpose, be at any time desirous to resume possession of the premises granted" upon certain terms as to notice and compensation.

The second appellants are holders of land under Government in virtue of a sanad originally granted to one George King on April 6, 1839, by the said East India Company, which declares the ground given in occupation is to be "at any time resumable by Government for public purposes" upon certain terms as to notice and compensation.

The Government gave notice in both cases to resume for a public purpose. On being challenged as to what that public purpose was, they explained that they wished for the ground in order to erect dwelling-houses, which they could offer to Government officials at adequate rents for their private residence. Suitable houses for Government servants are not easily obtainable in Bombay; but it is not said that obtaining quarters of some kind is an impossibility. The whole question, therefore, is: Is such a scheme a "public purpose" within the meaning of the contracts contained in the lease and the sanad?

(1) (1909) I.L.R. 24 Bomb. 600.

The learned judge of first instance in the High Court of Judicature at Bombay and the Appeal Court of the same Court have both held that it is. The learned judges in the Courts below have, in deference to citations made before them, elaborately considered many of the decisions which construed the words "public purposes," as used in the Statute of Elizabeth with reference to exemptions from rating. In the end, however, they came to the conclusion that those decisions afforded no help as to the proper construction to be put on the words of these contracts, and in that conclusion their Lordships unhesitatingly agree.

The argument of the appellants is really rested upon the view that there cannot be a "public purpose" in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor, J. in the first case, when he says: "General definitions are, I think, rather to be avoided where the avoidance is possible and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. Prima facie the Government are good judges of that. They are not absolute judges. They cannot say "Sic volo sic jubeo," but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment.

Their Lordships are therefore of opinion that on the general point the view of the Courts below was right.

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A special point was taken in the second case as to sufficiency of notice. It is enough to say that the view of the Courts below was clearly right in this matter.

Their Lordships will humbly advise His Majesty to dismiss the appeals, but there will be no costs to either party before this Board.

Solicitors for appellant in first appeal: *T. L. Wilson & Co.*
Solicitors for appellants in second appeal: *Latteys & Hart.*
Solicitor for respondent: *The Solicitor, India Office.*

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KARMALI ABDULLA ALLARAKHIA . . APPELLANT;

AND

VORA KARIMJI JIWANJI AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF BOMBAY.

Joint Adventure—Goods purchased by one Adventurer—Bills of Exchange—Liability of Partners—Indian Contract Act (IX. of 1872), ss. 239, 249, and 252.

Where persons enter into an agreement constituting a partnership limited to a joint trading adventure and goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure, the adventurers are liable as partners, but there is no such responsibility for goods purchased upon the credit of an individual adventurer though they are afterwards brought into stock as his contribution to the joint adventure.

Gouthwaite v. *Duckworth* (1810) 12 East, 421 followed and applied.

Saville v. *Robertson* (1792) 4 T.R. 720 distinguished.

APPEAL from a decree of the High Court (January 17, 1910) reversing a decree of Russell, J. (April 13, 1909).

The suit was brought by the appellant in the High Court against the three respondents to recover Rs. 111,819 for money lent and advanced by the appellant to the first two respondents by means of acceptances by the appellant of hundis, or bills of exchange, drawn upon him by them. The second respondent was an insolvent, and the third was joined as official assignee.

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

The facts are fully stated in the judgment of their Lordships. Shortly stated they were as follows. The first and second respondents had entered into an agreement dated July 25, 1906, therein described as being for the purpose of doing business in partnership in brown sugar from Mauritius to Hong Kong. Under this agreement each partner, after consultation, was to buy sugar in his own name, giving to the other a delivery order for half the quantity. When sufficient sugar had been purchased it was to be shipped to Hong Kong, separate invoices for half the quantity being made out to the respondents' respective Bombay houses, who were to carry through the sales at Hong Kong. Separate accounts of sales were to be kept, but the profit or loss on the entire transaction was to be divided equally. Under the agreement the respondents were each to draw bills for the sugar purchased, which under certain circumstances were to be accepted by the appellant.

Under this agreement the first respondent bought 36,000 bags and the second respondent 4000 bags of sugar, and in each case bills in respect of the price were drawn by the individual purchaser upon and accepted by the appellant, to whom the sugar was consigned. When the bills became due the first respondent retired those which he had drawn, but the second respondent, having become insolvent, failed to meet those drawn by him, and they were discharged by the appellant as acceptor. There was a loss upon the whole transaction, and in the result the balance sued for was due to the appellant. The first respondent denied his liability on the grounds that he had met all the bills drawn by him and that he was not liable for any moneys raised upon bills to which he was not a party. The second and third respondents did not defend the suit.

The suit was tried by Russell, J., who held that there was a partnership between the first and second respondents and that the money advanced by the plaintiff had been advanced for the partnership. He gave judgment for the plaintiff.

The High Court (Scott, C.J. and Batchelor, J.) reversed this decision. The learned judges were of opinion that the purpose and effect of the agreement were to keep the interest of the respondents separate and distinct until the close of the transaction,

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except in so far as a combination was desirable for securing joint shipments and sales. In concluding their judgment they said: "Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the plaintiff cannot succeed in charging the first defendant with liability on bills of the second defendant, and, having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which the shipper agreed to be liable for the default of the other in not taking up bills of exchange drawn by him on the plaintiff."

De Gruyther, K.C., and *O'Hagan*, for the appellant. Under the agreement the first and second respondents were joint adventurers and partners for that purpose: Indian Contract Act, 1872, ss. 239, 249, 252. The law of partnership in India depends entirely upon the Act above referred to. In construing a code the plain language of the statute must be given effect to: *Norendra Nath Sircar* v. *Kamalbasini Dasi*(1), citing *Bank of England* v. *Vagliano Brothers.*(2) A reference to English authorities can have no bearing. The liability was a partnership liability and the first respondent is liable.

Clauson, K.C., and *Lowndes*, for the first respondent. The first respondent was not liable in form upon the bills drawn by the second respondent, and he can only be held liable if the agreement amounts to a partnership for the particular transaction covered by the bills. Upon its true construction it does not do so: *Heap* v. *Dobson*(3); *Gibson* v. *Lupton*.(4)

De Gruyther, K.C., in reply, referred to *Gouthwaite* v. *Duckworth.*(5)

[*Clauson, K.C.*, as to the last cited case, referred to Lindley on Partnership, 8th ed., p. 248.]

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The judgment of their Lordships was delivered by

LORD DUNEDIN. This action arises out of transactions connected with a venture in brown sugar entered into by the first

(1) (1895) L.R. 23 Ind.Ap. 18, at p. 26.
(2) [1891] A.C. 107, at p. 145.
(3) (1863) 15 C.B. (N.S.) 460.
(4) (1839) 9 Bing. 297.
(5) 12 East. 421.

and second respondents. The second respondent is now bankrupt and the third respondent is his official assignee; and neither of them defended the action or took part in the proceedings under appeal.

The first respondent, Karimji, and second respondent, Rashid, were both merchants carrying on business in Mauritius, and had for some time been rivals in the sugar trade. Rashid had all along also had a Bombay house, and Karim was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The appellant, Karmali, is a merchant carrying on business in Bombay and Hong Kong.

Karim and Rashid resolved to have a joint speculation in brown sugar to be shipped from Mauritius to Hong Kong. The terms of the arrangement they made between themselves were on July 25, 1906, embodied in a stamped agreement. The document is too long to quote, but may be summarized thus: It begins with a preamble that the parties "for the purpose of doing business in partnership in brown sugar from Mauritius to Hong Kong agree to act as follows." Then follow the terms. Purchases were to be made "jointly" at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is imposed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is after consultation to be chartered, and loaded with the purchased sugar and despatched to Hong Kong. Invoices for the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time Rashid was to draw bills to the value of the sugar on his Bombay house, and Karim on his Bombay house when it came to be opened. But until that time came he was to draw bills on Karmali. If the banks at Mauritius refused to discount the bills on the Rashid or Karim house, the Bombay firms were to be informed by wire, in which case it was said that Karmali would come to the rescue by interposing credit according

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to arrangement made with him. On the ship arriving at Hong Kong the arrangements as to sale of the sugar were to be carried through by the Bombay houses. Account sales were to come from Hong Kong made up separately, half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hong Kong market being bad and there being an opportunity of a profit by reselling at Mauritius, this was to be done after permission got from Bombay; and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius banks refuse to discount the bills drawn by the Mauritius firms of the two defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by Karim, and about 4000 by Rashid. Delivery orders were then given by each to each for half of the sugar purchased by him, and the sugar so divided on shipment was consigned to the Hong Kong firm of the plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the banks to discount, recourse had to the assistance of the plaintiff; but they were at once drawn on and accepted by the plaintiff's firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped upon the separate invoices of each, i.e., about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hong Kong, and was sold by the plaintiff, to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realized not being sufficient

to give a profit after payment of the price of the sugar, the freight, and other expenses.

The plaintiff accordingly commenced this suit, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two defendants had become due, and were payable to the banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the plaintiff, whose name was on these bills as acceptor, had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to the plaintiff. The bankrupt respondent Rashid and his official assignee did not oppose judgment being entered against them; but the solvent partner Karim opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any moneys raised on bills to which he was no party.

The case was tried by Russell, J. in the High Court at Bombay, who after trial found in favour of the plaintiff. The material ground of his judgment may be effectively summarized by quoting two of his findings on the issues which he incorporated with his judgment, which were as follows: "I find (1.) there was a partnership between first and second defendants' firms . . . . (4.) The plaintiff paid and advanced moneys on the hundis (bills) for and on account and for the credit of the said partnership.

The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows: "Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the plaintiff cannot succeed in charging the first defendant with liability on bills of the second defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the plaintiff."

Their Lordships are of opinion that it is erroneous to treat the

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question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned trial judge to himself was right. The case of *In re Adansonia Fibre Co.*(1) seems to have been much pressed on the Court by the learned counsel. But the very first sentence of the judgment of James, L.J. shows that in that case the only question was whether in a winding-up proof could be made on the bills alone; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case. It is, however, a partnership of a limited character, and consequently liability to be enforced against one partner, when there is no document of debt which on its face binds him, can only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite* v. *Duckworth.*(2) In saying "the law," it would perhaps be more accurate to say, a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powell, and Lord Ellenborough says this: "There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorised, he says, to purchase on the joint account of the three, yet if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them." He distinguishes the case of

(1) (1874) L.R. 9 Ch. 635.

(2) 12 East, 421.

Saville v.*Robertson*(1) thus: "The case of *Saville* v.*Robertson*(1) does indeed approach very near to this; but the distinction between the cases is that there each party bought his separate parcel of goods which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise." And Bayley, J., after describing *Saville* v. *Robertson*(1) in the same way, says: "but here as soon as the goods were purchased the interest of the three attached in them at the same instant by virtue of the previous agreement."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing (inter alia) *Cunningham* v. *Kinnear*(2), a case on the same lines as *Gouthwaite* v. *Duckworth*(3), which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, s. 395, in words which their Lordships think accurately give the result of the cases both old and modern. "Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, &c., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution. . . . ."

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall, and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap* v. *Dobson*(4), while in the Scottish Courts may be taken as on the lines of *Gouthwaite'sCase*(3)the case of *British LinenCo.*v.*Alexander*(5) (where the facts are strikingly similar to the present case), and on the lines of *Saville's Case*(1) and *Heap's Case*(4), *White* v. *McIntyre*.(6)

(1) 4 T.R. 720.
(2) (1765) 2 Paton's App. Cas. 114.
(3) 12 East, 421.
(4) 15 C.B. (N.S.) 460.
(5) (1853) 15 Dunlop, 782.
(6) (1841) 3 Dunlop, 334.

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Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a judge, expressed some doubts as to whether the decision in *Gouthwaite* v. *Duckworth*(1) could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other judges, but is only an indication that a different view might have been taken of the facts of that particular case.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial judge was correct. The considerations which lead them to that result are as follows.

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and any one who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible resale in Mauritius itself. If either party in the case bought sugar, and then came to resell it in terms of that article, he could not refuse his co-adventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in *Saville's Case*(2) and *Heap's Case*(3), that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. On the appeal the learned judges of the High Court were impressed with the view that the agreement is "elaborately drawn for the purpose of keeping the interests of the two shippers distinct . . . . except in so far as a combination between them was desirable for the purpose of securing joint shipment and a sale of the sugar at Hong Kong." Their Lordships cannot take this view. It ignores the fact that, notwithstanding the separate shipment and consignment documents, the sugar was admittedly to be accounted

(1) 12 East, 421.

(2) 4 T.R. 720.

(3) 15 C.B. (N.S.) 460.

for as partnership sugar. Supposing that the particular parcels consigned by one had in some way been deteriorated, either by perils of the sea, without insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignment in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deploringly acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the plaintiff knew the whole terms and conditions of the agreement. He knew, therefore, he was helping by advance of credit the partnership in its purchase of sugar. The learned appeal judges say that the respondent Karim did not avail himself of the plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the fourth article of the agreement is true, but that the partners did not in fact avail themselves of the plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination, "For the purchase of all that sugar neither I nor Rashid paid a rupee; it was all paid for by hundis accepted by the plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the judgment of the trial judge restored, the defendant Karim paying costs in the Courts below and before this Board.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitor for first respondent: *Douglas Grant.*

J. C.* 1914 *Oct.* 29; *Nov.* 2.

DHIRAJ CHANDRA BOSE AND ANOTHER . APPELLANTS;

AND

HARI DASI DEBI AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land Revenue—Embankment Charges—Sale—Procedure by Certificate—Notifications—Bengal Embankment Act (Bengal Act II. of 1882), *s.* 70 *—Public Demands Recovery Act (Bengal Act I. of* 1895), *ss.* 7, 8—*Bengal Land Revenue Sales Act (Bengal Act XI. of* 1859), *s.* 5.

Notifications were issued under the Bengal Land Revenue Sales Act, 1859, s. 6, for the sale of certain land for arrears of land revenue. Subsequently a certificate was filed under the Public Demands Recovery Act, 1895, for arrears of embankment charges under the Bengal Embankment Act, 1882, in respect of the land. Before the day fixed for the sale the amount due for land revenue, but not that due for the embankment charges, was paid and an acknowledgment given. The Collector ordered the sale to proceed in respect of the embankment charges, but no notifications under s. 5 of the Act of 1859 were issued. The sale accordingly took place upon the date originally fixed:—

Held (affirming the High Court), that the sale was invalid, since, the Collector having acknowledged payment of the land revenue for which the sale was notified and having proceeded by certificate in respect of the embankment charges, the latter arrears could not be treated as arrears of land revenue without notifications under s. 5 of the Act of 1859.

APPEAL from a judgment and decree of the High Court (July 4, 1910) reversing a judgment and decree of the Subordinate Judge of Midnapore (March 29, 1909).

The question for determination in the appeal was whether the High Court had rightly decided that the first respondent Hari Dasi Debi was entitled to a decree setting aside a sale, under Act XI. of 1859, of a half share in a zamindari.

The facts were as follows. The first respondent Hari Dasi Debi was the proprietor of a half share of mahal Gumukpota in respect of which a separate account had been opened in the Collectorate register. There was an arrear in the payment of the kist due on January 12, 1907. Notifications dated February 16, 1907,

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE and MR. AMEER ALI.

were issued and published under ss. 6 and 13 of Act XI. of 1859 fixing March 26, 1907, as the date of sale of her share in the zamindari "for arrears of revenue and other demands which by law are realizable as arrears of revenue." The arrears due were stated to be "Rs. 547 including Police."

On March 13, 1907, a certificate was filed under s. 7 and s. 9, sub-s. 3, of Bengal Act I. of 1895 (the Public Demands Recovery Act), as amended by Bengal Act I. of 1897, for Rs. 69 for embankment charges (pulbandi) due under the Bengal Embankment Act (Bengal Act II. of 1882) in respect of the lands in question.

On March 25, 1907, the first respondent applied by petition to the Collector praying for exemption from sale of her share in the zamindari upon payment of the revenue in arrear. Upon this petition the Collector, on that day, ordered as follows: "May be accepted, if paid to-day." Upon inquiry from the clerk of the arrears collection department her agent was informed that the amount due was Rs. 807, and this sum was accordingly deposited by her on March 25 and receipts given. The Rs. 807, however, did not include the Rs. 69 due for pulbandi under the certificate of March 13, 1907.

On March 26, 1907, the non-payment of the Rs. 69 was reported to the Collector, who ordered as follows: "Rs. 69 remains to be paid; put up for sale." No notifications of the sale were issued under s. 5 of Bengal Act XI. of 1859. Accordingly on that day the half share in the zamindari was put up for sale and was knocked down at the nominal price of Rs. 500, it being valued at Rs. 50,000. The purchaser, Nandalal Mullick, sold to the first appellant Dhiraj Chandra Bose. The first respondent took proceedings to set aside the sale, but, on May 24, 1907, the Collector confirmed it and ordered the issue of a certificate of title. This order was confirmed by the Commissioner on July 26, 1907, and a sale certificate was subsequently issued.

The first respondent, in January, 1908, instituted the present suit against the purchaser, Nandalal Mullick, and the appellant Dhiraj Chandra Bose, to whom he had sold, claiming to have the sale set aside. By her plaint she claimed, inter alia, that the sale was illegal as the Collector did not act in accordance with the provisions of s. 5 of Bengal Act XI. of 1859, and upon the

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ground that she had been misinformed by the clerk at the Collectorate office as to the amount due.

The Subordinate Judge dismissed the suit. He held, inter alia, that there had been no order for exemption, since the condition upon which it would have been granted had not been fulfilled; that the sale took place for the arrears of land revenue and was valid and final, and that consequently no notifications under s. 5 of Act XI. of 1859 were necessary; and that the plaintiff's agent had not been misled as to the amount due, but that, if he had, the Court had no power to relieve the plaintiff upon that ground.

The High Court (Holmwood and Sharfuddin JJ.), by its judgment delivered on July 4, 1910, allowed the appeal. The judgment of the learned judges, after setting out the facts above stated and finding that there was evidence that the existence of the arrear of Rs. 69 might have been purposely withheld from the plaintiff, proceeded in the following terms:—

"We fully appreciate the importance of the dictum of their Lordships of the Judicial Committee in the case of *Gobind Lall Roy* v. *Ramjanam Misser*(1), that anything which impairs the security of purchases at revenue sales tends to lower the price of the estates put up for sale, and that the purchaser should not be exposed to the danger of having his sale set aside after a year upon new grounds.

"But the ground taken in this case is not new. It is the ground that has been apparent on the face of the Collectorate proceedings from the beginning, and was taken in the grounds of appeal to the Commissioner. Having regard to the carelessness apparent in this case, with which any and every statement of a mohurir is accepted by the subordinate revenue officers and passed on to the Collector, and to the immense temptation these mohurirs are under to traffic in revenue sales, we think that the evidence of the bona fides of the mohurirs should be most carefully scrutinized, and when, as in this case, there appears prima facie suspicion of misrepresentation the technical effect of the Collector's orders should be very strictly interpreted in favour of the plaintiff.

"There is no direct evidence of an attachment under the

(1) (1893) L.R. 20 Ind. Ap. 165.

certificate for Rs. 69, but the certificate itself obtained the force of a decree on March 13, 1907, when it was filed, and the order for sale on March 26, which was passed on the same day, is clearly an order for execution of the decree by sale, and operates as an attachment within the meaning of s. 17, for the words of that section are not 'ordered to be attached' but 'held under attachment by the revenue authorities otherwise than by order of a judicial authority,' but the sale is not bad on that ground alone since the attachment, if any, was made after the last day of payment and after the estate had become liable to sale for arrear of Government revenue: *Bunwari Lall* v. *Mahabir Proshad Singh*. (1) But the main ground for holding that the sale must be set aside is that it is not for arrears of revenue at all. Sect. 33 says 'no sale for arrears of revenue shall be annulled by a Court of justice,' it does not say 'no sale purporting to be for arrears of revenue shall be set aside.'

"It is in vain to say that the Collector could have sold the estate for arrears of embankment charges if he had not issued a certificate and had proceeded under s. 5 of the Act.

"It is urged that the omission to proceed under s. 5 is a mere irregularity, but their Lordships of the Judicial Committee did not lay this down in *Gobind Lall Roy's Case*(2), and the only authority we have been referred to, the case of *Deonandan Singh* v. *Manbodh Singh*(3), merely says that the non-issue of a notice under s. 5 is an irregularity which does not make a sale a nullity unless the ground has been specified in the appeal to the Commissioner. This case is rather in the plaintiff's favour and in any case no notice under s. 5 was held to be necessary in that case, as the arrears were not other than those of the current year and of the year immediately preceding.

. . . . . .

"Now, it is clearly established by the Collectorate ledger exhibited in this Court, by the chalans, and by the Collector's rubokari on May 24, 1907, that this Rs. 547 had been fully paid up and receipts granted for it. It is true no formal order of

(1) (1873) L.R. 1 Ind. Ap. 89.
(2) L.R. 20 Ind. Ap. 165.
(3) (1904) I.L.R. 32 Calc. 111.

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exemption had been passed in respect of it, and, therefore, the estate was still liable to sale for this arrear as advertised, but it is equally clearly established by these same papers that the estate was not sold for those arrears but for the Rs. 69 due for pulbandi under the certificate.

"Applying the law as we understand it and following the principles laid down by the Judicial Committee in the case of *Gobind Lall Roy* v. *Ramjanam Misser*(1), we are of opinion that the sale as held on March 26, 1907, was not a sale for arrears of land revenue, and that it was not competent to the Collector to hold such a sale under Act XI. of 1859.

"It appears to us that when the Collector has acknowledged payment in full of the arrears of land revenue for which the sale was advertised, and has elected to proceed by certificate procedure against an arrear of a different character, and has already directed a sale under that procedure, he cannot turn round and treat the arrear under the certificate as an arrear of land revenue, without any notice to the parties under s. 5, and proceed to sell the property under the land revenue proclamation on the mere ground that no special exemption order has been passed. The embankment charges ordered to be levied under the Certificate Act are taken out of the purview of Act XI. of 1859 unless and until fresh notices are issued under s. 5, and they cannot be treated as arrears of land revenue. The sale, therefore, not being for an arrear of land revenue is liable to be set aside, and the judgment and decree of the Subordinate Judge must be discharged with costs."

Upon the appeal to the Judicial Committee, the second defendant Nandalal Mullick, the purchaser, who had not appeared to the appeal to the High Court, was joined as a respondent.

There was also joined as a second appellant one Hem Chandra Bose. He had obtained a decree against the first respondent (plaintiff) for Rs. 13,000 on June 9, 1906, under which a sale of the plaintiff's share in the zamindari had taken place on June 19, 1907. This sale had been confirmed and an appeal to the High Court dismissed. As a preliminary point upon the appeal to the High Court in the present suit it was contended that by reason

(1) L.R. 20 Ind. Ap. 165.

of this sale the plaintiff had no longer any interest in the property and was not entitled to maintain the suit. The High Court rejected this contention upon the ground that, the revenue sale having taken place on March 26, 1907, the plaintiff had an interest in the mesne profits of the property for the period between the dates of the two sales.

Dunne, for the appellants. The petition for exemption from sale was made under s. 18 of Act XI. of 1859, which provides that "the Collector shall duly record in a proceeding the reason for granting such exemption." The Collector's order of March 25, 1907, was not therefore an order for exemption, but merely stated the condition upon which an order might be made. That condition was not fulfilled in that the full amount due was not paid. Under s. 6 of the Act of 1859 the sale properly proceeded as a land revenue sale, and that being so, no notices under s. 5 of the Act were necessary. No attachment took place under the certificate for the pulbandi, and the order of the Collector that the sale was to proceed cannot be regarded as an order under the certificate procedure. Under s. 33 of the Act of 1859 the order of the Commissioner confirming the sale was final and could not be annulled by a Court of justice. The first respondent had at the date of the suit no interest or title in the property, since it had been sold on June 19, 1907, under the decree of June 9, 1906. She was therefore not entitled to maintain the suit.

The respondents did not appear.

The judgment of their Lordships was delivered by

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LORD DUNEDIN. This is an appeal heard ex parte, and whenever this is the case it is a matter of considerable anxiety to the Board. But in this appeal that anxiety was certainly relieved by the exceedingly fair and candid way in which it was presented by the learned counsel for the appellants. In the result, upon a full consideration of the circumstances, their Lordships see no reason for interfering with the judgment of the Court below.

They will therefore humbly advise His Majesty to dismiss the appeal.

Solicitors for appellants: *Watkins & Hunter.*

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Oct. 27, 28; *Dec.* 2. KASHI PERSHAD SINGH (SINCE DECEASED) AND OTHERS } RESPONDENTS.

AND CONSOLIDATED APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Alienation by Widow—Consent of Reversioners—Evidence necessary to establish.

When the consent of the reversioners is relied on to validate an alienation by a Hindu widow, the consent must be established by positive evidence that upon an intelligent understanding of the nature of the transaction they consented to bind their interests; it must not be inferred from ambiguous acts nor be supported by dubious oral testimony. Mere attestation of a deed does not necessarily import consent to an alienation effected by it.

CONSOLIDATED APPEALS from judgments and decrees of the High Court (March 11, 1909) affirming judgments and decrees of the Additional Subordinate Judge of Monghyr (June 22, 1906).

The consolidated suits were instituted by the respondents to recover their respective shares of certain lands as reversionary heirs of one Shyamal Singh, who died in 1842. On the death of Shyamal Singh, his widow Dulhin Nawab Kumari succeeded to the lands in suit for a Hindu widow's estate. In 1877 she executed a mortgage of part of the property in favour of the first appellant Hari Kishen Bhagat, and in 1882 she executed in his favour a further mortgage, which covered the rest of the property. She also in 1889 executed in his favour a zarpeshgi patta (lease at a premium) of the whole property for eleven years. The mortgage of 1877 was attested by Raghubir Singh, the sole surviving brother of Shyamal Singh and at that time the next reversionary heir, also by Behari Singh, the son of one of Shyamal Singh's deceased brothers. The signature of the deed was made for the widow by Bajrung Sahai Singh, one of

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

the respondents and the son of another deceased brother of Shyamal Singh; he also purchased the stamp paper upon which the deed was written. The mortgage of 1882 was attested by Bajrung Sahai Singh and signed in the widow's name by Behari Singh. It was not witnessed by Raghubir. The lease of 1889 was witnessed by a son of Raghubir, a son of Behari, and by Bajrung Singh. At all the dates referred to there appeared to have been in existence other nephews of Shyamal Singh besides those mentioned above.

In 1893 and 1897 the first appellant obtained decrees upon the two mortgages respectively, and having brought the mortgaged properties to sale he purchased them himself. The widow died in 1900.

In 1904 the respondent Bajrung Sahai Singh and the respondents Kashi Pershad Singh and Ram Pershad Singh (the sons of Raghubir) commenced the present suits to recover their shares in the properties. They claimed that the mortgages and lease were not executed upon legal necessity and that the interest of the appellant under the purchases determined upon the widow's death. The appellant pleaded, inter alia, that there had been legal necessity for the transactions and that they had been entered into with the knowledge, approval, and consent of the then reversionary heirs of Shyamal Singh. At the trial the mortgagee (defendant) gave verbal evidence that the two mortgages were arranged with him by Raghubir, Bajrung, and Behari, and with regard to that of 1877 he alleged that he told them that he would not make the loan unless they consented to the transaction.

The Additional Subordinate Judge heard the suits together. He held that upon their true construction the mortgages bound only the widow's limited interest, and that it was only that interest which had been sold under the decrees. He also held that there was no such legal and valid necessity as would bind the reversionary heirs and that the attestations by the reversioners were not intended as recognitions that more than the widow's estate was bound. He accordingly made decrees in the plaintiffs' (appellants') favour.

The High Court (Doss and Richardson JJ.) affirmed these

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decrees. It was held, inter alia, that no legal or valid necessity for the mortgages had been established, and that the attestation of the then reversionary heir to the mortgage of 1877 did not amount to consent, but that even if it could be taken as proving that he consented, that consent was not by itself sufficient to establish legal necessity, and that it was of no avail as corroborative evidence of necessity since there was no other evidence upon which any reliance could be placed. The learned judges also drew a distinction between a mortgage and a conveyance, holding that it was only in the case of the latter that the consent of the then next reversioner made the transaction binding upon the reversioners generally.

Dunne, for the appellants. Both Courts in India found that there was no legal or valid necessity for the mortgages. The facts, however, as to the attestation and signature coupled with the verbal evidence showed that they were made with the knowledge and consent of the reversioners, including that of Raghubir, who was the sole next reversioner at the time of their execution. His attestation of the mortgage of 1877 is under the circumstances conclusive that he consented to that transaction. The authorities establish that where the next reversioner consents to an alienation by a Hindu widow there is a presumption of law that it was made for legal necessity and the transaction is binding in the absence of fraud or some other invalidating circumstance: *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) ;*Raj Lukhee Dabea*v.*Gokool Chunder Chowdhry* (2) ; *Bajranghi Singh* v. *Manokarnika Bakhsh Singh.* (3) The view of the High Court that the consent of the reversioners cannot validate a mortgage as opposed to a conveyance is erroneous: *Debi Prosad Chowdhury* v. *Golap Bhagat.* (4) That case, however, is in conflict with the decision of the Board in L.R. 35 Ind. Ap. 1 in treating the presumption as rebuttable.

[LORD DUNEDIN. Their Lordships require to hear counsel for the respondents only as to the mortgage of 1877.]

Lowndes, for the respondents. The evidence did not establish

(1) (1860) 8 Moo. Ind. Ap. 529.
(2) (1869) 13 Moo. Ind. Ap. 209.
(3) (1907) L.R. 35 Ind. Ap. 1.
(4) (1913) I.L.R. 40 Cal. 721.

that Raghubir consented to the mortgage. The Subordinate Judge found that the oral evidence was absolutely unreliable. Raghubir's consent cannot be inferred from his being an attesting witness, as there was no evidence that he thought that the deed bound more than the widow's limited interest. The Subordinate Judge held that it had no wider effect, and Raghubir may well have thought the same. The deed did not purport to be made with the consent of the kindred or of the next reversioner. [*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(1), *Jiwan Singh* v. *Misri Lal*(2), and *Sham Sundur Lal* v. *Achhan Kunwar*(3) were referred to.] In any case, even if Raghubir consented, that consent would not validate a mortgage made without legal necessity. The principle under which the concurrence of the next reversioner may validate a conveyance depends upon the widow's power to surrender to him, but that principle cannot apply in the case of a mortgage where the widow remains in possession. The distinction is clearly drawn in *Behari Lal* v. *Madho Lal Ahir Gyawal.*(4) There was no proof of the general concurrence of the kindred, and that, in any case, only raises a rebuttable presumption that there was necessity: *Debi Prosad Chowdhury* v. *Golap Bhagat.*(5)

Dunne replied.

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The judgment of their Lordships was delivered by

MR. AMEER ALI. The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the defendant, appellant, on November 26, 1877, in respect of

(1) 13 Moo. Ind. Ap. 209.
(2) (1895) L.R. 23 Ind. Ap. 1.
(3) (1897) L.R. 25 Ind. Ap. 183.
(4) (1891) L.R. 19 Ind. Ap. 30.
(5) I.L.R. 40 Calc. 721.

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three of the properties in her possession. On July 11, 1882, she mortgaged the rest of the properties to Bhagat for a further loan and in 1889 she gave him what is usually called in India a ticca patta of the shares of Shyamal Singh in all the mauzas save one. Under this usufructuary lease the defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate and living in commensality with him, and are, therefore, necessary parties.

The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Raghubir's sons, of whom there were several, and the sons of two other brothers, Bhupal

and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behari.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Pershad, another son of Raghubir, Bishan Pershad, one of the sons of Behari, and Bajrung Sahai, who also appears to have identified the lady to the registrar. Both the Courts in India have found that, so far as the ticca patta of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof aliunde that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to the transactions.

In the present cases the trial judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of

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fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The trial judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Singh* v. *Misri Lal*(1), arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(2) this Board refused to affirm the proposition that mere attestation by a relative necessarily imports concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

Their Lordships are of opinion that the judgments appealed

(1) L.R. 23 Ind. Ap. 1. (2) 13 Moo. Ind. Ap. 209, at p. 228.

from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Theodore Bell & Co.*

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JEHANGIR DADABHOY AND ANOTHER . . APPELLANTS;

AND

KAIKHUSHRU KAVASHA AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

J. C.*

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Oct. 29; *Nov.* 2, 26.

Will—Construction—"Estate to be made over"—Uncertain Event—Vesting at Death of Testator—Indian Succession Act (X. *of* 1865), *s.* 111.

The will of a Parsi testator, made in 1866, provided that his estate should be divided equally between his two sons P. and J., and that, as P. was of weak intellect, the management of the estate should be entrusted to J.; it further provided as follows: "if my elder son P. gets a male issue, half of the estate is to be made over to him on his attaining full age . . . . If my son P. does not get a son, my son J. is to give away his son as P.'s palak (or adopted son). All the clauses of this my will are applicable to the said adopted son. If a son be born of the body of P. he (shall) on his attaining full age be the owner of a half share in the . . . . estate belonging to me." The testator died in 1866; P. died in 1897, intestate and without having had any male issue. It was alleged that in 1886 J. gave his son as P.'s palak, and that the adoption was confirmed after P.'s death. J.'s son claimed to succeed under the will to P.'s half share in the testator's estate:—

Held, that both upon its true construction and as the effect of the Indian Succession Act, 1865, s. 111, the will vested a moiety of the testator's estate in P. absolutely upon the testator's death, and that neither P.'s son nor J. as palak had any interest under the will unless P. died before the testator.

APPEAL from a judgment and decree of the High Court (December 9, 1910) affirming a judgment and decree of the Subordinate Judge of Thana (April 2, 1910).

The respondents (plaintiffs) were the administrators of the estate of Pallonji Dadabhoy, deceased, and the deceased's heirs

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

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according to the Parsi Intestate Succession Act, 1865. The appellants (defendants) were the brother of Pallonji Dadabhoy and the former's son. The claim in the suit was (inter alia) that the rights and interests of the parties in the estate might be ascertained and partitioned.

The question for determination depended upon the construction and effect of the will of one Dadabhoy Byramji, a Parsi and the father of Pallonji Dadabhoy and of the first appellant.

The material provisions of the will, which was dated August 6, 1866, are set out in the judgment of their Lordships and appear shortly from the head-note.

The testator died on August 21, 1866, and the entire estate had since been in the possession and under the management of the first appellant as provided by the will. The appellants pleaded that Pallonji, the deceased, had in his lifetime taken Byramji, the second appellant, as his palak, this adoption being confirmed according to the customs of Parsis after his death, and that as the testator's palak the second appellant was entitled under the will to a moiety of the testator's estate.

The Subordinate Judge held that Pallonji and Jehangir each took absolute estates in one half of the estate of the testator, that there were no words of gift in favour of a palak, and that, if there were, the gift was void under s. 111 of the Indian Succession Act, 1865. He also held that the deceased had not adopted Byramji as his palak during his lifetime, and that among Parsis adoptions of this kind were obsolete, the only practice at the present time being the appointment of a palak on the third day after death for purely religious purposes; he also held that the Parsi Intestate Succession Act, 1865, did not recognize an adopted son as heir. He accordingly made a preliminary decree under Order xx., r. 13, of the Code of Civil Procedure, 1908.

The High Court (Rao and Batchelor JJ.) affirmed this decision. Rao J. was of opinion that the effect of the will was to make the absolute gift to Pallonji defeasible in the event of his having a son and that son attaining his majority, but as that event had not occurred the absolute gift became indefeasible. The learned judge rejected the contention that there was an executory devise in favour of Byramji as palak which took effect upon Pallonji's

death, holding that there were in the will no words of gift in his favour, either as a persona designata or as a palak son. He held further that even assuming that there was an executory bequest to the second appellant as palak, it would be void under s. 111 of the Indian Succession Act, 1865. Upon this point he said: "The bequest to the palak son is to take effect upon the happening of an uncertain event, namely, if no son is born to Pallonji. No time is mentioned in the will for the occurrence of this event. The bequest would therefore be void unless this event happened before the period of the payment or distribution of the fund bequeathed. So long as Pallonji was alive there was a possibility of his having male issue, and until his death there was no chance of Byramji becoming a palak son. It follows therefore that the event on the happening of which the legacy to Byramji was to take effect did not occur before the testator's death, which would ordinarily be the period of payment on distribution of the fund bequeathed." The learned judge rejected the contention that the period of distribution in the present case was either the time when the natural born son of Pallonji came of age, or the death of Pallonji, and held that it was the testator's death.

Batchelor, J. was of the same opinion for the same reasons.

De Gruyther, K.C., and *Horace Miller*, for the appellants. Upon the true construction of the will Pallonji took only a defeasible interest in the testator's estate, and in the events which have happened his interest passed upon his death to his nephew Byramji, the first appellant. The will was written in the Gujerathi language by the testator himself, and should be construed liberally so as to give effect to the intention of the testator: *Huncoomanpersaud Panday* v. *Mussumat Babooce Munraj Koonweree*(1); *Chunilal Parvatishunkur* v. *Bai Sambath*(2); *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row*.(3) The testator's object was to preserve the whole estate in the male line and that in default of Pallonji having a son the first appellant should in every respect be substituted for one. There could be

(1) (1856) 6 Moo. Ind. Ap. 393, at p. 411.
(2) (1914) I.L.R. 38 Bomb. 399.
(3) (1914) L.R. 40 Ind. Ap. 51, at p. 71.

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no other object in using the words "all the clauses of this my will are applicable to the said adopted son." Among Parsis there is a well-recognized custom of nominating a son or palak. Although this custom bears no relation to adoption in Hindu law, the testator would be familiar with the principle of adoption as a substitution for a natural son. [History of the Parsees, by Dosabhoy Framjee (London, 1858), Act IX. of 1857, and the Parsi Intestate Succession Act (XXI. of 1865) were referred to.] The gift to Byramji may be regarded as being to him as a persona designata, and not as depending upon the effect of the adoption as a palak. The will is governed by the Indian Succession Act, 1865, but s. 111 of that Act has no application. That section applies where it is uncertain whether the event contemplated will take place before or after the period of distribution. In this case the event contemplated was Pallonji succeeding to half the estate but dying without a son, and that event could not happen until after the death of the testator. Sect. 111 does not invalidate a defeasance to take place upon an event which must happen after the testator's death. [*Edwards* v. *Edwards*(1), *O'Mahoney* v. *Burdett*(2), and Jarman on Wills, 1910 ed., pp. 452, 2209, were referred to.] *Norendra Nath Sircar* v. *Kamalbasini Dasi*(3) is distinguishable, as the facts in that case clearly came within s. 111, illustration b.

Sir Robert Finlay, K.C., and *Lowndes*, for the respondents. Upon the true construction of the will Pallonji took an absolute interest, which descended to the respondents as his heirs under the Parsi Intestate Succession Act, 1865. Unless Pallonji predeceased the testator neither his natural son nor his nephew took any interest. But even if upon the true construction there is a defeasance in favour of Pallonji's possible natural son, the position of the palak is different. The general words in clause 11 by which the clauses of the will are made applicable to a palak are followed by an express devise to Pallonji's son, but there are no words of gift to a palak. But if there is a devise to Byramji, either as palak or as a persona designata, it is void under s. 111 of the Indian Succession Act, 1865, since the event upon which it

(1) (1852) 15 Beav. 357. (2) (1874) L.R. 7 H.L. 388.
(3) (1895) L.R. 23 Ind. Ap. 18.

was to take effect did not take place before the death of the testator. That section applies to all contingent bequests whether by an executory devise or by substitution: *Norendra Nath Sircar* v. *Kamalbasini Dasi.*(1) There could not be a palak until three days after Pallonji's death, and if the palak were not of full age he could not take till later; therefore s. 111 applies equally whether the period of distribution is the death of the testator or the death of Pallonji.

De Gruyther, K.C., in reply referred to *Sreemutty Kristoromoney Dossee* v. *Maharajah Norendro Krishna*(2) and *Bai Motivahoo* v. *Bai Mamoobai.*(3)

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a decree of the High Court of Judicature at Bombay, dated December 9, 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated April 2, 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on August 8, 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the estate are these: "The said two sons are proprietors, half and half alike, and in equal (shares), of my whole estate, outstandings, debts, title, and interest. . . . . Both the heirs are to take care of the said estate and look after it, and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar's assessment. . . . . In this my testamentary writing, I the testator have appointed my two sons as (my) heirs."

The will then states that Pallonji, the elder, a man then of about thirty-nine years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the estate "by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole estate with unanimity with

(1) L.R. 23 Ind. Ap. 18. (2) (1888) L.R. 16 Ind. Ap. 29.
(3) (1897) L.R. 24 Ind. Ap. 93.

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my elder son Pallonji in such a way as not to injure his (Pallonji's) rights."

Up to this point in the will there can be no doubt whatsoever that the property of the estate was effectively and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these: "At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the estate is to be made over to him, on his attaining (his) full age."

And it may be proper that the eleventh clause of the will should be quoted in full. It reads thus: "I, the testator, have in the second clause of this will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable estate, etc. appertaining to the half share during the lifetime of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter, or any (other) person (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's palak (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he (shall) on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable estate belonging to me. My heir (and) vakil (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body)."

The material facts of the case are that the testator having executed this will on August 8, 1866, died within a fortnight thereafter, namely, on August 21, 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the will indicates. Jehangirji entered upon the management of the

whole estate, having obtained probate of the will in 1867. This state of matters lasted for 30 years, namely, till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act, 1865. The nature of the suit by these heirs is for an account, for an ascertainment of the rights and interests of the parties in the estate, and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, namely, that it is alleged that on December 3, 1886, Pallonji adopted, as his palak, Byramji his nephew, the son of Jehangirji. Jehangirji and his son Byramji (the present appellants) resist the suit, maintaining that Byramji as palak, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one half of the estate, or, as it would be expressed in English phraseology, the terms of the will were such as to prevent vesting in Pallonji.

The learned judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as palak of his uncle. The points among others discussed were (1.) whether such a palak could ever take under the will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a palak taking could ever be purified, namely, that Pallonji should die without a son, and (2.) the peculiar point as to the office of a palak to a Parsi becoming effectual only three days after the adoptive father's death. (3.) A further question was keenly argued, namely, whether the will contained in itself sufficient words of grant or gift to the palak.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's will one

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half of the estate conveyed vested in Pallonji a morte testatoris. The result of the argument presented would be that if Pallonji had had a son who reached twenty-one during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son who should take upon attaining twenty-one years of age would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the lifetime of the testator and of his having left a son, the situation also being provided for of that son being at that period of time under twenty-one.

But when the father Pallonji himself survived the testator it does not appear to their Lordships that there are any words in the will sufficient to cut down the right of Pallonji to one half of the estate to a life interest therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a will, in their Lordships' opinion the same result is precisely reached by the application of s. 111 of the Indian Succession Act, 1865. Their Lordships agree with the view that has been taken as to the applicability of that section in the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and the appellants will pay the costs.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondents: *Ranken Ford, Ford & Chester.*

MAHARAJAH SIR RAVENESHWAR PRASAD SINGH AND OTHERS . . . . } APPELLANTS;

AND

BAIJNATH RAM GOENKA AND OTHERS . . RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Revenue Sale—Notification—Specification of Property—Ijmali Share—Bengal Land Revenue Sales Act (Bengal Act XI. of 1859), *ss.* 6, 10, *and* 11.

In a notification of sale for arrears of revenue under Bengal Act XI. of 1859 the specification of the property to be sold must be sufficiently definite and clear in itself to enable possible purchasers to know what they are invited to bid for without reference to information in the Collector's office.

A mahal consisted of 360 villages, but 148 separate revenue accounts had been opened under ss. 10 and 11 of Bengal Act XI. of 1859. The ijmali, or joint estate remaining, was put up for sale under the above Act. The specification in the sale notification was: "Ijmali share which cannot be specified, excluding the separate accounts"; a list of the 148 separate accounts followed and the words "all other shares besides that specified are excluded from the sale":—

Held, that the notification was insufficient and, the evidence showing that substantial injury had resulted, that the sale was invalid.

APPEAL from a judgment and decree of the High Court (May 1, 1907) reversing a judgment and decree of the Subordinate Judge of Monghyr (June 30, 1904).

The question for determination in the appeal was whether the appellants were entitled to set aside a sale of a certain share in a zamindari for arrears of Government revenue.

The property sold was the ijmali (joint) or residuary share of a zamindari which consisted in all of 360 villages. The zamindari had been broken up by numerous sub-divisions caused by the opening of separate accounts under ss. 10 and 11 of Bengal Act XI. of 1859. These sub-divisions were liable to constant change upon transferees of the interests of individual co-sharers opening separate accounts. It frequently happened that villages or groups of villages in respect of which separate accounts had

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

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been opened were themselves the subject of further sub-division. In these cases, upon an application being made, a fresh separate account would be opened in respect of one of the subdivided portions, the remainder, which had previously formed a separate account, falling back into the ijmali or residuary share. At the date of the sale there were 148 separate accounts opened in respect of parts of the zamindari.

The revenue in respect of the ijmali share being in arrear, notifications of sale were published under Bengal Act XI. of 1859. In the notification appearing in the *Calcutta Gazette* the property to be sold was described in the fifth column thus: "Ijmali share which cannot be specified, excluding the separate accounts"; a list of the 148 accounts followed and the words "all other shares besides that specified are excluded from the sale."

Notifications were affixed in the Collector's office and in the Court of the judge of the district, which were substantially in the above form, although slightly different versions of the vernacular were given. In the seventh column of the notifications the sudder jama of the ijmali share was stated to be Rs. 2615. The ijmali share was sold on September 9, 1901, to the first respondent for Rs. 33,500. The Collector rejected an application by the appellants to set aside the sale upon the ground that the notifications were insufficient, and this decision was affirmed by the Commissioner.

The appellants commenced the present suit in September, 1902, claiming that the sale should be set aside and that possession of the property with mesne profit be awarded to them.

The Subordinate Judge set aside the sale. He was of opinion that under Act XI. of 1859 and the rules of the Board of Revenue there had been no proper specification of the property to be sold; that the notifications did not enable bidders to know what properties were comprised in the ijmali share. He further held that the value of the ijmali share was far in excess of the price realized, and that the inadequacy of price was the result of the failure to specify the property in the notices.

The High Court reversed this decision. The learned judges in the course of their judgment said: "Sects. 6 and 13 of Act XI.

of 1859 do not require that the names of the villages of the share should be specified. They only require that the share to be sold should be specified, but do not explain what details are essential to its due specification. It would therefore seem sufficient if the share to be sold were specified, so that it can be identified and that it can be understood by intending bidders what is about to be sold. This has been laid down in the well-known judgment of Wilson J. in *Ram Narain Koer* v. *Mahabir Pershad Singh*(1), in which it is said that all that is necessary is that the notification should specify the estate or shares in the estate to be sold, and that in selling a share in an estate it is unnecessary to specify the shares or mauzas of which the share is composed. . . . . It is impossible, we consider, for any intending purchaser justly to say that he was misled by the description of what was to be sold. It will be seen that it is described as the ijmali share, from which were to be deducted the shares for which separate accounts had been opened, as shown in the separate sheet appended to the notification. The other columns of the notice were fully and correctly filled up. No exception is taken to the entries in any of them. The name of the mahal, its taujih number, the Government revenue of the estate and the proportionate Government revenue of the share to be sold, and the amount of the arrears due for that share are all correctly entered in them. Now we think that, in these circumstances, the notice specified the share to be sold and gave intending purchasers sufficient notice of what was to be put up to auction, for it was perfectly easy to examine the separate sheet and see what was not to be sold, and so to understand that what was to be sold was what remained of the estate." The learned judges did not agree with the Subordinate Judge's valuation of the property and found upon the facts that the plaintiffs had failed to show that the price realized was inadequate, but that if it were inadequate there was no evidence that this was due to the non-specification of the mauzas in the notice.

Sir Erle Richards, K.C., and *Dunne*, for the appellants. The specification of the property to be sold did not satisfy the

(1) (1886) I.L.R. 13 Calc. 208.

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provisions of ss. 6 and 13 of Bengal Act XI. of 1859, or the form contained in the Manual of Revenue and Patni Sales Law, published in 1902 by the Board of Revenue in Bengal. Column 5 in that form is headed "if only a share is to be sold, specification of such share." The specification must be such that intending bidders have reasonable information as to what is to be sold. Where separate accounts have been opened of geographical divisions of the property, as opposed to fractional shares, the subject of the sale should be particularized so that it can be identified. [*Hem Chandra Chowdhry* v. *Sarat Kamini Dasya*(1) and *Ismail Khan* v. *Abdul Aziz Khan*(2) were referred to.] The observations of Wilson, J. in *Ram Narain Koer* v. *Mahabir Pershad Singh*(3) had reference to cases where separate accounts had been opened under s. 10 of the Act and not to cases, like the present, where there were separate accounts under s. 11 of the Act. Each case must depend upon its own particular facts, and in the present case the specification was insufficient owing to the complicated character of the ijmali. The view of the High Court upon the facts as to the value of the ijmali share was wrong, and that of the Subordinate Judge correct. [*Tassaduk Rasul Khan* v. *Ahmad Husain*(4) was also referred to.]

De Gruyther, K.C., and *Dube*, for the respondents. The specifications in the notifications were sufficient. The whole information as to details of the property was in the Collector's books and was open to proposing bidders. The general principle is that the estate to be sold is to be specified, but that it is not necessary to give details showing what the estate consists of. [*Ismail Khan* v. *Abdul Aziz Khan*(2), *Dilchand Mahto* v. *Baijnath Singh*(5), *Amirunessa Khatoon* v. *Secretary of State for India*(6), Bengal Act VII. of 1868, s. 6, and Bengal Act VII. of 1876, s. 4, were referred to.] The observations of Wilson J. in *Ram Narain Koer* v. *Mahabir Pershad Singh*(3) referred to cases where separate accounts had been opened whether under s. 10 or s. 11 of Act XI. of 1859. The High Court rightly held that in any event there had been no substantial injury. The learned judges based the

(1) (1900) 6 Calc. W.N. 526.
(2) (1905) I.L.R. 32 Calc. 502.
(3) I.L.R. 13 Calc. 208.
(4) (1893) L.R. 20 Ind. Ap. 176.
(5) (1903) 8 Calc. W.N. 337.
(6) (1884) I.L.R. 10 Calc. 63.

valuation of the ijmali share upon the road cess return made under Bengal Act IX. of 1880, s. 20. That return furnishes the best evidence of value. Even if the specification were irregular and the auction price below the true value, there was no evidence that the insufficiency of price was due to the irregularity rather than to the sale being a forced sale.

Sir Erle Richards, K.C., replied.

The judgment of their Lordships was delivered by

MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Bengal, dated May 1, 1907, and the question for determination relates to the validity of a sale for arrears of revenue, held under Act XI. of 1859, of a share of an estate called Mahal Bisthazari situated in the district of Monghyr.

The case offers an illustration of the extreme complexity of the land system existing in Bengal. A 15 annas 6 dams share of Mahal Bisthazari seems to have been in existence as an independent fiscal unit for a considerable time. It includes 360 villages, and in the Collector's register is entered as bearing taujih No. 336, which marks its position as a separate revenue-paying estate.

As is usually the case in Bengal and elsewhere in India, a large number of persons possess proprietary rights in this mahal; they own specific shares, some in one village only, others in several villages. Ordinarily the whole estate held in this wise is liable to be put up for sale for default in the payment of Government revenue. But Act XI. of 1859, which lays down the rules for the realization of the revenue payable to the State, provides (by s. 10) that "a recorded sharer of a joint estate held in common tenancy," or (by s. 11) "a recorded sharer of a joint share whose share consists of a specific portion of the land of the estate," may apply to the Collector to open a separate account for the payment of his share of the revenue separately from the others. These separate accounts in respect of separate shares ensure that no share of an estate other than the one in respect of which the default had occurred should be exposed to sale (s. 13) until and unless the highest offer for that share does not equal

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the amount of the arrear (s. 14), when the whole estate becomes liable to be put up for sale.

In accordance with the provisions of ss. 10 and 11 of Act XI. of 1859, 148 owners of specific but undivided shares in Mahal Bisthazari applied for and obtained from the Collector separation of accounts. This left, however, a large residue, commonly called the ijmali or joint share, the owners of which remained jointly liable for the revenue due in respect thereof.

In August, 1901, this ijmali share was found to be in arrears for the March and June kist or instalment of Government revenue, amounting to Rs. 604, and it was advertised for sale on September 9, 1901. An application appears to have been made to the Collector for postponement of the sale, which, however, was refused, and the sale was held on the advertised date, when the property was purchased by the defendant respondent, Baijnath Goenka, for a sum of Rs. 33,500.

An appeal to the Commissioner of the division, preferred by the owners of the ijmali share, under s. 25 of the Act, having been dismissed, the plaintiffs brought their suit in the Court of the Subordinate Judge of Monghyr for the annulment of the sale. The grounds on which they base their action are exactly the same as those they urged before the Commissioner. These grounds are set forth with sufficient distinctness in paragraph 18 of the plaint, sub-clause (*e*), which is in these terms: "That the description of the ijmali share given in column 5 of the said notification was incorrect, insufficient, and misleading, and, having regard to the nature of the interests included in the said ijmali account and to the fact that it was constantly fluctuating, a fuller and more specific description thereof, with particular reference to the villages and the diverse interests making it up, should have been given, all materials for the same being available to the Collector in his office. The omission to give such detailed description of the ijmali account has largely affected the sale and value of the property sold."

Shortly stated, the points at issue resolve themselves into two questions, one of law and the other of fact: (1.) Whether, having regard to the purpose in view, the specification of the property in the sale notification was in accordance with the provisions of

the law; and (2.) whether, in case the requirements of the law had not been complied with, the plaintiffs, by reason of the irregularity, had sustained substantial injury.

The trial judge found both questions in favour of the plaintiffs. He held in effect that the specification was insufficient and defective, and that in consequence thereof the property was sold at a gross undervalue. He accordingly made a decree annulling the sale. The High Court, on appeal, came to a directly opposite conclusion on both points, and, reversing his judgment, have dismissed the plaintiffs' action.

In these circumstances it becomes necessary, in their Lordships' opinion, to consider carefully the description or specification which the trial judge holds to be insufficient and irregular, and which the High Court, on the other hand, regard as sufficiently complying with the requirements of the law.

Act XI. of 1859 is a stringent enactment for the realization of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of ss. 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. An exact compliance with the requirements of the Act is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law requiring specification of the properties to be sold, as well as of the Board's rules, is clearly to enable likely purchasers among the public to know exactly what is going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

In the present case the notification under ss. 6 and 13 of the Act was affixed in the Collector's office and in the Court of the judge of the district; and as the revenue payable in respect of the ijmali share exceeded Rs. 500, it was also published in the *Calcutta*

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Gazette, which is the official gazette prescribed in the Act. In this notification, which bears date August 7, 1901, what purports to be a specification of the share to be sold is in these terms: "Ijmali share which cannot be specified excluding the separate accounts number . . . ."; then follows a long list of the 148 separate accounts already referred to, and at the end the following words occur: "all other shares besides that specified are excluded from the sale."

In the sale notification issued on August 6, 1901, which was apparently the one affixed in the Collector's office, the entry in column 5 (the specification column) is as follows: "The ijmali share cannot be particularised owing to separate accounts having been opened. The share to be sold are those (*sic*) given in a separate sheet after excluding the share in respect of which the separate accounts have been opened." The learned judges of the High Court have given in their judgment a translation of the vernacular words in the notice. It is not necessary to consider whether their rendering is quite correct, for the fact remains that admittedly there was no specification of the share to be sold beyond what has already been stated. The intending purchaser was left to gather for himself by going through an elaborate process of elimination the property that was advertised for sale, and for which he was expected to bid. It is to be observed that the publication of the notice in the *Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and mukhtars of the neighbourhood, which is likely to be the case where, as in this instance, the notification gives little or no particulars in respect of the property advertised for sale.

The cases to which their Lordships' attention has been invited give, in their opinion, no assistance in the determination of the point at issue here. As already observed, each case must depend on its own particular facts; what has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's office. In

their Lordships' opinion the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

Their Lordships, therefore, have no hesitation in agreeing with the trial judge that the notification in this case was insufficient and irregular and not in compliance with the requirements of the law.

Sect. 33 provides that no sale should be set aside on the ground that it was made contrary to the provisions of the Act, unless the plaintiff proves that he has sustained "substantial injury" by reason of the irregularity complained of. The trial judge found that the property was worth a lakh of rupees, and that in consequence of the irregularity in the sale notification the defendant was enabled to buy it for one-third of its value.

The learned judges of the High Court, after an elaborate calculation, thought that, considering the mortgages on the property, it had fetched at the sale a fair value. In view of this divergence of opinion their Lordships have examined the evidence for themselves, and they have come to the conclusion that the view of the trial judge, both as regards the value and the fact that the lowness of the price was due to the defectiveness of the notice, was well founded. With respect to the value, the weight of evidence is clearly on the side of the plaintiffs; whilst a reference to the bid-sheet and the testimony of Balmakand and Korban Ali leave little room for doubt that the low figure at which the property was knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale notification.

Their Lordships cannot help regretting that the Commissioner did not annul the sale on the appeal preferred to him, which would have saved a long and harassing litigation extending over twelve years.

Their Lordships are of opinion that the judgment and decree of the High Court ought to be set aside and the decree of the Subordinate Judge restored, save and except as to villages Matasi and Mirzaganj, in regard to which the claim is permitted to be withdrawn, with liberty to the appellants to institute a fresh

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suit in respect thereof, if so advised. The respondents must pay the costs of this appeal and of the appeal in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Watkins & Hunter.*

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MUNNA LAL PARRUCK AND OTHERS .. APPELLANTS;

AND

SARAT CHUNDER MUKERJI AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mortgage—Limitation—Preliminary Mortgage Decree—Application for Sale—Limitation Act (IX. of 1908), Sched. I., art. 183—Transfer of Property Act (IV. of 1882), ss. 88 and 89—Code of Civil Procedure (Act V. of 1908), Order xxxiv., rr. 4 and 5.

In a suit in the High Court upon his mortgage, a mortgagee obtained by consent a decree, dated December 16, 1886, for payment on June 15, 1887, with a provision that in default of payment the mortgaged properties should be sold and that the mortgagor should make good any deficiency arising under the sale. On July 3, 1909, no payment having been made, the mortgagee applied to the High Court for leave to sell the mortgaged property:—

Held, that the High Court rightly decided that the application was one "to enforce a judgment or decree" within the meaning of Sched. I., art. 183, of the Limitation Act, 1908, and was barred since it was not made within twelve years from June 15, 1887.

APPEAL from an appellate order of the High Court (July 20, 1911) affirming an order of Fletcher J. (May 13, 1910).

The sole question for determination in the appeal was whether or not an application made on July 3, 1909, was barred by limitation.

By a registered mortgage dated January 25, 1886, the first respondent mortgaged to Amlook Chund Parruck (represented in the appeal by the appellants) his share in certain properties in Calcutta.

* *Present*: LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

The mortgagor made default in repayment and the mortgagee instituted a suit upon the mortgage in the High Court. In that suit a decree was made by consent on December 16, 1886, for payment of Rs. 25,832 in six months, with a provision that in default of payment the mortgaged properties should be sold and that the mortgagor should pay any deficiency which should arise upon the sale.

In 1903 the first respondent sold his interest in one of the mortgaged properties to a purchaser who resold it to the second respondent.

On July 3, 1909, the mortgagee filed an application to the High Court for an order joining the second respondent as a party to the suit, and for an order that he (the mortgagee) might be at liberty to sell the mortgaged property in pursuance of the decree of December 16, 1886.

The application was heard by Fletcher J. and dismissed. The learned judge was of opinion that the portion of the decree of December 16, 1886, which ordered the mortgagor to pay Rs. 25,832 was the real and substantial part of it, that the application was in substance one to enforce the decree, and that it was consequently barred by art. 180 of Sched. II. of the Limitation Act, 1877, since it was not made within twelve years from June 15, 1887. In his view the application was not one for an order for sale under the Transfer of Property Act, 1882, and the authorities relied upon by the plaintiff did not apply.

The Appellate Bench of the High Court (Sir L. Jenkins C.J. and Woodroffe J.) affirmed the order of Fletcher J. The learned Chief Justice said that, even assuming (as contended by the plaintiff) that the decree of December 16, 1886, was a decree under the Transfer of Property Act, 1882, it did not contemplate a further decree, but merely an order for sale under s. 89 of that Act. In his view the application was either a proceeding in execution or a proceeding for judicial relief under a decree, and art. 183 of Sched. I. of the Limitation Act, 1908 (corresponding to art. 180 of Sched. II. of the Act of 1877), applied. The learned Chief Justice was also of opinion that if the decree had been an incomplete one, a further decree being required,

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then art. 181 of the Act of 1908 would have barred the application, since the difficulties of applying the corresponding article of the Act of 1877 to an application for an order to sell had been removed in the case of art. 181 by the provisions of the Code of Civil Procedure, 1908.

Woodroffe J. agreed.

The proceedings upon the appeal to the High Court are reported at I.L.R. 38 Cal. 913.

Jenkins, K.C., and *Sir W. Garth*, for the appellants. The Courts below were wrong in holding that the application was one "to enforce a decree." The decree of December 16, 1886, was merely a preliminary mortgage decree which could not be enforced until an order absolute had been made. The application was really one for an order absolute for sale under s. 89 of the Transfer of Property Act, 1882. Decisions of the Calcutta High Court support the view that an application of that character is not barred by any limitation provision. The Transfer of Property Act, 1882, ss. 85, 86, 87, 88, and 89, and the Code of Civil Procedure, 1908, Order xxxiv., rr. 4 and 5, were referred to.

[*De Gruyther, K.C.*, who appeared with *Romer Macklin* for the respondents, drew attention to *Batuk Nath* v. *Munni Dei*(1) and *Abdul Majid* v. *Jewahir Lal*.(2) After some discussion, the appellants' counsel conceded that these decisions were fatal to their argument.]

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Nov. 5.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellants: *G. C. Farr.*

Solicitors for respondents: *J. E. Fox & Co.*

(1) (1914) L.R. 41 Ind. Ap. 104. (2) (1914) I.L.R. 36 Allah. 350.

AHMED MUSAJI SALEJI AND OTHERS .. APPELLANTS;

AND

HASHIM EBRAHIM SALEJI AND OTHERS .. RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

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Procedure—"Preliminary Decree"—"Decree"—Absence of Appeal—Preclusion of Appeal on Final Decree—Code of Civil Procedure (Act V. of 1908), *s.* 2, *sub-s.* 2; *s.* 97—*Partnership—Dissolution—Partners retaining and using Assets—Liability to pay Interest.*

In a suit for partnership accounts after a dissolution, the trial judge, on August 30, 1909, declared the partnership dissolved and referred the matter to the assistant referee, (1.) to inquire who were the partners entitled to the assets and goodwill, and (2.) to take an account of the dealings of the parties with the assets. This adjudication was not appealed from. The report of the assistant referee showed that large sums, forming part of the assets, were in the hands of the appellants, and had been used by them in continuing the business for their benefit. The trial judge by his decree ordered these sums to be paid into Court together with interest thereon at 6 per cent. per annum from the date of the dissolution. Upon appeal the present appellants contended, inter alia, that the trial judge had no jurisdiction to refer the question as to who were the partners, and further that they should not have been ordered to pay interest:—

Held, that the adjudication of August 30, 1909, was a "decree" within the meaning of the definition contained in s. 2, sub-s. 2, of the Code of Civil Procedure, 1908, in that it declared the partnership dissolved, and being a "preliminary decree" within s. 97 of that Code, the appellants, not having appealed from it, were precluded thereby from disputing its correctness upon appeal from the final decree in the suit.

Held, further, that it is well settled that when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for those assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud.

APPEAL from a judgment and decree of the High Court in its appellate jurisdiction (September 1, 1913) affirming, with a slight variation, a judgment and decree of Fletcher J. (April 22, 1912).

The suit was instituted in the High Court by the first respondent as one of the sons and executor of Ebrahim Soleman Saleji,

* *Present*: LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

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deceased, against the appellants and the other respondents, claiming (inter alia) an account of the dealings and assets of the firm of Ebrahim Soleman and Co., in which his deceased father had been a partner. The partnership had been dissolved by arrangement between the partners on and from July 1, 1907, and the suit was commenced in June, 1908. On August 30, 1909, the trial judge, Fletcher J., declared that the partnership was dissolved and "ordered and decreed" that the matter be referred to the assistant referee of the Court, (1.) to inquire who were the partners who were entitled to share in the assets and goodwill, and (2.) to take an account of the dealings of the parties with the assets of the partnership business. This "order and decree" was not appealed from, and an inquiry accordingly took place. The report of the assistant referee showed, inter alia, that the appellants were retaining in their hands considerable sums forming part of the assets of the partnership, and had used them in continuing the business for their own benefit.

The learned judge dismissed certain exceptions to the report filed by the appellants and made a decree that they should bring into Court the amounts for which they were severally found liable to the partnership with interest at 6 per cent. per annum from July 1, 1907, the date of the dissolution.

The appellants appealed to the High Court in its appellate jurisdiction, contending, inter alia, that the decree or order of Fletcher J. of August 30, 1909, was wrongly made in so far as it referred to the assistant referee the question as to who were the partners, and further that they should not have been ordered to pay interest.

The High Court, by its judgment delivered on September 1, 1913, slightly reduced the amount payable by the appellants by way of principal, but in other respects affirmed the decree. The learned judges held that the appellants, not having appealed against the decree or order of August 30, 1909, were precluded from disputing its correctness.

Sir R. Finlay, K.C., Dunne, and *B. N. Bose,* for the appellants. The trial judge had no jurisdiction to refer to the assistant referee the question as to who were the partners entitled to

the assets and goodwill of the firm. Under the Code of Civil Procedure, 1908, Order xx., r. 15, it was only the taking of the accounts which could be referred. So far as the question as to who were the partners was referred the adjudication of August 30, 1909, was not a "preliminary decree" within s. 97 of the Code of Civil Procedure, 1908, since it was not a "decree" within the definition in s. 2, sub-s. 2, of that Code; there was no controversy as to the firm being dissolved. It was an order from which there was no right of appeal and which could only be questioned upon appeal from the final decree. [*Khadem Hossein* v. *Emdad Hossein*(1) and Code of Civil Procedure, 1908, s. 104, sub-s. 1 (i.), were referred to.] The appellants should not have been ordered to pay interest. Interest was not claimed by the plaint and the facts did not establish any case of fraud. [Interest Act (XXXII. of 1839), s. 1; 3 & 4 Will. 4, c. 42, ss. 28 and 29; Bullen and Leake, 2nd ed., pp. 51 and 52; *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*(2); and *Johnson* v. *Rex*(3) were referred to.]

LORD DUNEDIN. Their Lordships are of opinion that the appellants are precluded by s. 97 of the Code of Civil Procedure, 1908, from disputing the correctness of the decree of August 30, 1899; the reasons will be given later.

Upjohn, K.C., Cozens-Hardy, K.C., and *Lowndes*, for the respondents. It is well established by decisions in the Court of Chancery that when after a dissolution a partner retains assets in his hands and trades with them the other partners have an election either to take the profits so made as partnership assets or to have the retained assets paid to the partnership with interest: *Clements* v. *Hall*(4); *Yates* v. *Fenn*(5); Lindley on Partnership, 8th ed., pp. 677 et seq. This right exists independently of fraud and of the common law and statutory liability. It is immaterial that interest was not claimed in the pleadings: *Burland* v. *Earle*.(6)

Sir R. Finlay, K.C., replied.

(1) (1901) I.L.R. 29 Calc. 758.
(2) [1893] A.C. 409.
(3) [1904] A.C. 817.
(4) (1858) 2 De G. & J. 173.
(5) (1880) 13 Ch. D. 839.
(6) [1905] A.C. 590.

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The judgment of their Lordships was delivered by

LORD SUMNER. This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on June 30, 1908, and on August 30, 1909, the trial judge, Fletcher J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from July 1, 1907, and then "ordered and decreed" that—"It is referred to the assistant referee of this Court to take the following account and to make the following inquiries, that is to say:—(1.) To inquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business; (2.) to take an account of the dealings of the parties with the assets of the said partnership business"; and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The assistant referee duly held the inquiries directed, and all matters were gone into at a great expenditure of time and money. His report on inquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher J.

The appellants then, by memorandum of appeal dated May 23, 1912, raised the question whether inquiry No. 1 was rightly included in the adjudication dated August 30, 1909, or whether it was not one which should have been made by the learned judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher J. was a "decree" or an "order" within the meaning of those terms in the Code of Civil Procedure (Act V. of 1908). If it was a decree it was a preliminary decree within s. 97, and any appeal was incompetent and barred thereby; if it was an order

it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the assistant referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the inquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher J., which included this direction, was itself a decree, and therefore being a preliminary decree could not under s. 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus in limine settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a litis contestatio. The declaration when so made was what the Court's adjudication and indeed the appellants' own case call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree: it did not cease to be such because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters involved in the suit, and the expression "matters in controversy" in s. 2, sub-s. 2 (the definition of "decree"), cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen, and were the

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foundation of the whole determination. The Code has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein*.(1) Accordingly s. 97 of the Code applies; the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely, that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion, and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the assistant referee disclosed conduct of this sort on the appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the referee meant to find that it did. Both Courts below adopted this report, and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Burton, Yeates & Hart.*

Solicitors for respondents: *Watkins & Hunter.*

(1) I.L.R. 29 Calc. 758.

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AND

MATHEWSON AND OTHERS .. RESPONDENTS

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Incumbered Estate—Lease—Sanction of Commissioner—Grant to Limited Company—Chota Nagpur Incumbered Estates Act (Bengal Act VI. of 1876), s. 17 and r. 16.

By s. 17 of the Chota Nagpur Incumbered Estates Act, 1876, as amended by s. 7 of Act V. of 1884, the manager of an incumbered estate administered under the former Act has power to demise all or any part of the estate for any term of years or in perpetuity. By r. 16, made under s. 19 of the Act of 1876, "no lease shall be given for any term exceeding . . . . four years without the sanction of the Commissioner":—

Held, that where it is affirmatively established that the transaction itself, in all its essential particulars, has been sanctioned by the Commissioner, it is not necessary that the deed by which it is carried out should have been submitted for his sanction.

Semble that the fact that the intended grantee of a patni lease under the above Act is a limited company is an essential particular, and it must be established that the Commissioner sanctioned the lease with knowledge of that fact.

APPEAL from a judgment and decree of the High Court (April 28, 1910) affirming a judgment and decree of the Subordinate Judge at Manbhum (November 25, 1907).

The question for determination in the appeal was whether a patni lease granted by the manager of an incumbered estate administered under the Chota Nagpur Incumbered Estates Act, 1876, had received the sanction of the Commissioner, required by r. 16 of the rules made under s. 19 of that Act.

The patni lease in question was dated June 29, 1890, and was granted to Robert Watson & Co., Limited, under the circumstances stated in their Lordships' judgment. The grantees of the lease had conveyed their rights thereunder to the first

* *Present*: LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE and MR. AMEER ALI.

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respondent. In 1905 the estate was released from the operation of Act VI. of 1876, and the present appellants subsequently instituted the suit, claiming a declaration that the patni lease was invalid, and possession.

The Subordinate Judge dismissed the suit, holding that the patni lease had been duly sanctioned.

The High Court (Woodroffe and Richardson JJ.), by its judgment delivered on April 28, 1910, affirmed this decision.

Upjohn, K.C., and *Dunne,* for the appellants. The sanction of the Commissioner is a condition precedent to the validity of the lease under r. 16 of the rules made under s. 19 of the Act of 1876. The rules appear in the Court of Wards Manual, 1897, at p. 200. The correspondence relied on did not show that the Commissioner sanctioned the terms of the patni lease granted, but that he contemplated the grant of a patni lease in the terms of the existing ijara lease. The full details should have been sanctioned by the Commissioner. The decision in *Gulabsingh* v. *Seth Gokuldas*(1) is distinguishable. The enactment there in question was s. 18 of the Central Provinces Wards Act (XVII. of 1885), under which the sanction required is that of the Chief Commissioner, who could not be expected to consider the whole details. In any case the sanction in the present case was insufficient since it only referred to the grant of a patni lease to R. Watson & Co., an unincorporated firm, whereas the lease was granted to Robert Watson & Co., Limited. The identity of the patnidars was a material particular since they would remain liable for the performance of the covenants even if the lease was assigned.

De Gruyther, K.C., and *Sir W. Garth,* for the respondents. The correspondence establishes that the Commissioner sanctioned all the essential features of the transaction. It was not necessary that the actual lease granted should be produced to the Commissioner for his sanction. The decision in *Gulabsingh* v. *Seth Gokuldas*(1) is not distinguishable in principle and applies to this case. The fact that the proposed patnidars had been incorporated as a limited company was known to the Commissioner,

(1) (1913) L.R. 40 Ind. Ap. 117.

and it is to be inferred that the sanction given was to grant the lease to the limited company although the Commissioner refers to them by their unincorporated title.

Upjohn, K.C., replied.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment and decree of the High Court of Bengal, dated April 28, 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated November 25, 1907, dismissing the suit with costs. The main object of the suit was to obtain a declaration of the nullity of a patni lease dated June 29, 1890. The other demands in the plaint were consequential upon such a declaration of nullity being obtained. The only question argued in the appeal was whether the patni lease was ultra vires and invalid.

The facts are briefly these. The first appellant, the plaintiff, is the son and successor of the late Raja Broja Kishore Singh Deb Darpashaha, the owner of the Barabhum estate. In 1883 the Raja borrowed Rs. 60,000 from Messrs. Robert Watson & Co. on a mortgage of his estate, and on February 27 of that year he executed an ijara lease in their favour. This lease contained a condition that if the company should desire to take a patni lease of such portions of 84¼ villages as were treated in the ijara as ghatwali lands the Raja would grant such a patni on certain terms. On March 8, 1885, this patni was granted. Four years thereafter, namely, on March 6, 1889, the affairs of the Raja being deeply embarrassed, his estate was placed under the protection of Government by virtue of the Chota Nagpur Incumbered Estates Act, 1876.

There were apparently considerable difficulties in arranging for the liquidation of the debts. After negotiations it was agreed that the remaining portions excluded from Messrs. Watson & Co.'s former patni lease should be demised to these creditors for a sum of Rs. 30,000. Their Lordships have considered the documents and have no hesitation whatever in accepting the view that the true and, in fact, only meaning of the transaction was that expressed in the Commissioner of Chota Nagpur's letter of February 20, 1890, in which he sanctioned

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"the proposal to grant them a patni lease of the 84¼ villages excluded from the present patni."

The elements of the transaction being thus settled and the amount of the premium arranged, what remained to be done was to have the actual deed drawn up and executed. This was done. It has been argued before the Board that the patni lease which was sanctioned was to be a lease containing the terms of the ijara lease. The Board cannot assent. These two contracts are essentially different in character, the latter being of a temporary character, containing provisions and reservations suitable to a lease for a short duration. Their Lordships have no hesitation in accepting the judgment of the High Court which is thus expressed on this point: "The fact that the Raja had granted a previous patni lease was known to the Commissioner, and was, in fact, referred to in his sanction. . . . . It is . . . . reasonable to assume that the Commissioner understood its character when he was asked to sanction a similar patni. It would have been inconvenient that the subsequent patni should be on any different terms from the first, because, as pointed out in the course of the correspondence, the proposed new patni was in respect of villages which were scattered about in the area covered by the earlier patni, and the object of the second patni was to round up the estate. I do not think, therefore, that this ground has been made out."

Apart from the point just dealt with, the patni lease actually granted is now challenged. The grounds of challenge may be compendiously and conveniently stated as follows:—

(1.) It is said that the sanction was, upon a sound construction of the letter of February 20, 1890, merely a sanction of a proposal to grant a patni. Their Lordships think the objection to be trivial. This proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned.

(2.) It was said that the sanction contained the clause "provided that the amount be paid before the end of March, 1890." In the course of carrying out the bargain some delay, not very great, occurred. There was an exchange of views as to the actual wording of the draft patni, but the document was finally

settled by both parties, and on June 25, 1890, Messrs. Watson & Co. paid the salami of Rs. 30,000 to the official manager of the estate, namely, the Deputy Commissioner. This being done, it does not appear to their Lordships that it would have been open thereafter for a challenge to be made, even by the Deputy Commissioner himself, or for the Commissioner's sanction to have been withdrawn. A fortiori there appears no ground for sustaining such a challenge when put forward after a considerable lapse of years on behalf of the successor of the debtor.

(3.) The last objection is of a twofold character. It is urged that the sanction of the Commissioner, being a statutory requisite in virtue of the Chota Nagpur Incumbered Estates Act, 1876, of the rules thereunder, and of the Act of the Governor-General, No. V of 1884, such sanction was not given to the final and actual patni lease itself. This depends upon the construction of r. 16, which is in the following terms: "The power to lease under section 17 of the Act shall be subject to the following provision:—no lease shall be given for any term exceeding three years without the sanction of the Deputy Commissioner, or exceeding four years without the sanction of the Commissioner."

Upon this point their Lordships are of opinion that when it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited. The first head of this objection accordingly fails. And it was further urged that in any view the transaction which was sanctioned was a transaction of a grant of a patni lease to Robert Watson & Co., in other words, to a firm of individual men, and not to Robert Watson & Co., Limited, i.e., a different and incorporated persona. This demands careful consideration. There is this to be said for the objection, that the

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persona in the latter case is different from the persona in the former, and that a change in the lessee or patnidar ought to be treated as a change in essentials. It may be added that a patni lease of land, an agreement of an important and wide-reaching character, might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise and difficulties suggest themselves with regard to a limited company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in persona in the lessee. In the opinion of their Lordships, it is not necessary to pronounce any judgment upon this point in the present case. For their Lordships are of opinion that when the negotiators in the course of correspondence mentioned in their letters Robert Watson & Co., they did in fact mean and were perfectly understood to mean Robert Watson & Co., Limited, the fact of the incorporation of the limited concern being well known; and, indeed, one of the principal documents of the case is the petition dated May 14, 1889, being the petition of Robert Watson & Co., Limited, filing the account of the money due to them. It may be true that the limited concern is a different one from the previous and unincorporated firm, but in the language of the judgment of the High Court, "the misdescription does not, under the ordinary principle applicable to such matters, affect the validity of the sanction or the lease. Though there was such a misdescription, it is perfectly clear what was intended by the sanction, and that it was intended that the lease should be given and taken by the persons who are properly described as Messrs. Robert Watson & Co., Limited."

A point was taken to the effect that the patni transaction could not be held to have been ratified, seeing that it had not specifically taken into account the existence of khuroposh, or maintenance rights, over the property sold. These could in no view have been affected for the simple reason that the interests of third parties, properly secured over the properties, were in no respect prejudiced. And as to the further point that in the

event of the discontinuance of these rights a certain reversion would follow to the zamindar, their Lordships are of opinion that, this reversionary right not being in fact embraced within the grant, no prejudice to any such right has occurred. The point accordingly fails.

Their Lordships are of opinion that the judgments of the Courts below are correct, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellants: *Theodore Bell & Co.*
Solicitors for respondents: *Burton, Yeates & Hart.*

MOTABHOY MULLA ESSABHOY . . . APPELLANTS; J. C.*
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AND
MULJI HARIDAS . . . . . RESPONDENT. *Feb.* 2, 3, 25.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Evidence—Promissory Note—Contemporaneous Oral Agreement—Admissibility—Indian Evidence Act (I. of 1872), s. 92—Pleading—Conditional Admission.

The respondent had agreed to advance Rs. 50,000 to a certain firm to enable it to repay a debt of that amount to the appellant; the advance was to be made on January 30, 1908. In December, 1907, the appellant required Rs. 50,000 to meet a bill falling due and asked the firm to pay their debt, suggesting that they should arrange for the respondent to make the agreed advance immediately. On December 23, 1907, the appellant and the firm made a promissory note for Rs. 50,000 payable on demand to the respondent, who handed that sum to the appellant. In a suit by the respondent against the appellant upon the note, the latter alleged that at the time the note was made it was orally agreed between the parties that upon January 30, 1908, the Rs. 50,000 agreed by the respondent to be advanced to the firm should be held as made by the money paid under the note, and that the liability upon the note should be satisfied by a fresh note to be given to the respondent by the firm.

Held, that the oral agreement was as to a matter on which the promissory note was silent and was not inconsistent with its terms, and

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* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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that it was accordingly admissible in evidence under the Indian Evidence Act, 1872, s. 92, proviso 2.

Held, further, that, though it is permissible to accept part and to reject part of a witness's testimony, an admission in pleading cannot be so dissected; if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.

APPEAL from a judgment and decree of the High Court in its appellate jurisdiction (October 8, 1912) reversing a judgment and decree of Davar J. (April 11, 1912).

The suit was instituted in the High Court by the respondent against the appellant to recover Rs. 50,000, the amount of a promissory note dated December 23, 1907, made by the appellant jointly with Hyderally Cassumji, Sons & Co. (hereinafter called Hyderally) and payable upon demand to the respondent or order. Under a written agreement dated August 1, 1907, the appellant had agreed to advance to Hyderally Rs. 1,50,000 for the purpose of paying off a debt due from Hyderally to the appellant. The Rs. 1,50,000 were payable by three instalments of Rs. 50,000 each, of which two had been paid to Hyderally, and by him paid to the appellant, and the third was not payable until January 30, 1908. The appellant in December, 1907, required Rs. 50,000 to meet a hundi then falling due and asked Hyderally for repayment of the Rs. 50,000 still owing and suggested that Hyderally should arrange with the respondent to pay the remaining instalment of Rs. 50,000, due under the agreement upon January 30, 1908, immediately. It was in these circumstances that the joint promissory note was given; it was admitted that the respondent had paid the Rs. 50,000 and that the money had reached the hands of the appellant. The respondent by his plaint set out the circumstances and alleged that it was arranged between the parties to the note that the appellant's liability upon it should cease upon January 30, 1908, if Hyderally had then fully secured the respondent for all the money due to him which he had agreed to do, but that the security had not been given.

The appellant by his written statement alleged that there was an oral agreement that his liability upon the note should cease upon January 30, 1908.

At the trial evidence was admitted on behalf of both parties

as to the circumstances under which the note sued upon had been given and of the oral arrangement made in respect of it. The appellant's evidence was to the effect that the arrangement was that on January 30, 1908, the advance which the respondent had agreed to make to Hyderally on that date should be regarded as having been made by the money paid under the promissory note sued upon, and that the liability upon the note should be held or satisfied by a fresh note to be granted by Hyderally to the respondent for that agreed advance.

Davar J. did not regard the respondent's (plaintiff's) evidence as to the oral agreement as reliable, and, treating his pleading as an admission that there was some arrangement under which the note sued upon was not to be valid after January 30, 1908, made a decree in favour of the appellant. Upon appeal the Court (the Chief Justice and Chandavarkar J.) reversed this decision upon the ground that the oral agreement set up by the present appellant (even if established by the evidence which the learned judges thought it unnecessary to discuss) was one which varied the terms of the written contract contained in the promissory note and was consequently inadmissible in evidence by s. 92 of the Indian Evidence Act, 1872. The learned judges accordingly made a decree in favour of the present respondent for Rs. 50,000.

Upjohn, K.C., and *E. B. Raikes* for the respondent. The evidence given at the trial established that there was an agreement under which upon January 30, 1908, the Rs. 50,000 to be advanced under the agreement of August 1, 1907, was to be treated as already made, and the liability upon the note was to be satisfied by a fresh note to be given by Hyderally for that agreed advance. This agreement was not one which varied the terms of the promissory note. It dealt with a matter as to which the note was silent and was admissible in evidence under the Indian Evidence Act, 1872, s. 92, proviso 2. [*Bholanath Khettri* v. *Kaliprasad Agarwalla*(1), *Harris* v. *Rickett*(2), and *Lindley* v. *Lacey*(3) were referred to.] Further the respondent by his plaint himself alleged that there was a collateral verbal

(1) (1871) 8 Beng.L.R. 89.
(2) (1859) 4 H. & N. 1.
(3) (1864) 34 L.J. (C.P.) 7.

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agreement and cannot exclude the appellant's evidence as to its terms: *Holt* v. *Miers.*(1)

Sir R. Finlay, K.C., and *Lowndes*, for the respondent. There was no satisfactory evidence of the verbal agreement alleged by the appellant. The trial judge was not entitled to treat the respondent's pleading as an admission which helped to establish that agreement. The agreement alleged was not admissible in evidence as it varied the written contract to pay upon demand. [Indian Evidence Act, 1872, ss. 91 and 92; Taylor on Evidence, 10th ed., ss. 1132 and 1135; *Pym* v. *Campbell* (2); and *Wallis* v. *Littell* (3) were referred to.] In any case the verbal agreement as pleaded by the appellant was clearly inadmissible and no amendment was applied for.

Upjohn, K.C., in reply The view of the trial judge, who saw the witnesses, should be accepted as to the effect of the evidence: *Khoo Sit Hoh* v. *Lim Thean Tong.*(4)

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Feb. 25.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The plaintiff respondent, Mulji Haridas, sues the defendant appellant, Motabhoy Mulla Essabhoy, upon a promissory note jointly executed by the defendant and the firm of Hyderally Cassumji, Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July, 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000, the consideration for making such advances being certain shares in an agency commission in a certain company. The advances were partially but not wholly covered by security. In July, 1907, Hyderally applied for a further advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy, and the third instalment fell to be paid on January 30, 1908.

At the end of December, 1907, Motabhoy was in want of

(1) (1839) 9 C. & P. 191.
(2) (1856) 6 E. & B. 370.
(3) (1861) 11 C. B. (N.S.) 369.
(4) [1912] A.C. 323.

money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing January 30. He consented to do so on being given the joint promissory note in question of date December 23, 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of January 30, 1908, the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date, and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at January 30, 1908, Hyderally had given sufficient security for the whole debt as then due by him, that on January 30 no such sufficient security was given, and that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned judge of first instance allowed the parties to go to trial and examine witnesses. Coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally, he gave judgment in favour of the defendant. The High Court upon appeal took the view that no witnesses should have been examined and that the testimony could not be looked at because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and s. 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on January 30, 1908. That is a bald averment of a verbal contract contradicting the written contract, and would be inadmissible under s. 92. But this bald averment does not represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus: "It was agreed that

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on January 30, 1908, the advance then to become due by Mulji to Hyderally should be held as made by the moneys paid on December 23, 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of January 30, 1908." That would be an agreement in terms of proviso 2 to s. 92, which allows to be proved "the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realized by the learned judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by January 30, the learned judge takes it as a necessary sequitur that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordships' judgment, that the defendant fails. The agreement must be an agreement to which the plaintiff Mulji is shown to have assented either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded, and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's counsel sought to put his case thus: he said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after January 30.

that no doubt he adhibited the condition that security was by that date to be given, but that, as the judge of first instance disbelieved the story that any such condition was made, the matter rested on his own confession that the promissory note lost its efficacy after January 30. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on January 30 by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by January 30.

Their Lordships are therefore of opinion that the decree of the Court of Appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant: *Ranken Ford, Ford & Chester.*
Solicitors for respondent: *T. L. Wilson & Co.*

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BOMBAY COTTON MANUFACTURING COMPANY, LIMITED .. } APPELLANTS;

AND

MOTILAL SHIVLAL .. RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Oral Evidence—Credibility of Witnesses—Opinion of Judge at Trial—Weight upon Appeal.

Generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses. The view of the trial judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the Appellate Court.

APPEAL from a judgment and decree of the High Court in its appellate jurisdiction (February 5, 1912) reversing a judgment and decree of Beaman J. (July 24, 1911).

The suit was instituted in the High Court by the respondent, a banker, claiming to recover from the appellants Rs. 1,23,769 as the balance due upon accounts between them. The appellants by their written statement contended that an item of Rs. 2 lakhs debited against them in the accounts was a fraudulent debit and did not represent a real transaction. They alleged that upon the accounts being properly taken there was a balance due to them, for which they counterclaimed.

The appellants' case was that the Rs. 2 lakhs had been debited against them by means of fraudulent entries in the accounts of the appellants and the respondent, the transaction being carried out by one Dani, the respondent's manager, and one Dwarkadas, the managing director of the appellant company. The circumstances under which the entries were made appear from the judgment of their Lordships.

The questions in the suit were wholly questions of fact and depended substantially upon the credibility of Dani as a witness

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

on behalf of the respondent, and that of two witnesses on behalf of the appellants. Dwarkadas died before the trial took place.

The trial judge was of opinion that the appellants' witnesses were "absolutely truthful," but that Dani was "unscrupulous, untrustworthy, and untruthful." He found that the transaction was a deliberate fraud to which Dani was a party, and he referred the suit to take the accounts upon the basis that the debit of Rs. 2 lakhs should be excluded. In the result he made a decree in the appellants' favour for Rs. 1,17,633.

The High Court (the Chief Justice and Russell J.) reversed this decision and made a decree in favour of the respondent for Rs. 1,01,295. The learned judges found that the appellants had failed to prove that Dani was a party to the fraudulent scheme; they accepted his denial and considered that the evidence on behalf of the appellants was inconsistent with the facts established.

Upjohn, K.C., and *Dunne*, for the appellants. The trial judge saw and heard the witnesses and his view as to their relative credibility, a view which was not inconsistent with the proved facts, should have been accepted: *The Alice*(1); *Montgomerie & Co.* v. *Wallace-Jones*(2); *Khoo Sit Hoh* v. *Lim Thean Tong.*(3) The evidence proves that Dani was a party to the fraudulent scheme.

Sir R. Finlay, K.C., Kenworthy Brown, and *E. B. Raikes*, for the respondent. The view of the Appellate Court upon the evidence was correct. Further the appellants are bound by the acts of Dwarkadas, their managing director. He had full powers to represent them, and the transaction fell within his general and ostensible powers.

The judgment of their Lordships was delivered by

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SIR GEORGE FARWELL. This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a

(1) (1868) L.R. 2 P.C. 245.
(2) [1904] A.C. 73.
(3) [1912] A.C. 323.

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banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August, 1909, agent and managing director of the appellant company, and of two other companies, the Tricumdas and the Lakhmidas; in 1908 the appellant was a flourishing and solvent company, and the two other companies were largely insolvent; and both were heavily indebted to the respondent for advances, to the amount of about 5½ lakhs. The respondent was pressing Dwarkadas for further and better security in respect of these sums, and also of other moneys advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant company. This arrangement was carried out by entries which can only be characterized as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for Rs. 85,000, and one from the Lakhmidas Company for one lakh and Rs. 15,000, and sent them over by his son to the office of the appellant company, to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodar telephoned to the cashier of that company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as: "Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95500 S.S., and 1. 15000 cheque drawn on the Bank of Bombay bearing No. 7. 94950 S.S. No. 2." The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation, except fraud. The transaction was merely a paper one for the purpose of shifting the respondent's security from the two insolvent to the one solvent company. The judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's; he has stated that he has seldom seen in the box "such serviceable clear-headed

and absolutely truthful witnesses" as the two sons or a more "thoroughly unscrupulous, untrustworthy, and untruthful man" than Dani, and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a judge trying the case should not be lightly disregarded.

With all respect to the appeal tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of the two witnesses whom the trial judge in this case has believed to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, e.g., that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lordships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance-sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable

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position and reduced to shuffling answers." The observation might be of disastrous effect if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action; its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the judge's belief or disbelief in the witness's story, and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the High Court in its appellate jurisdiction be set aside and that of the High Court in its original jurisdiction be restored, and that the respondent do pay the costs of this appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Latteys & Hart.*

LAHAR PURI . . . . . APPELLANT; J. C.*
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AND
PURAN NATH . . . . . RESPONDENT. *Feb.* 4, 5, 10, 11; *March* 15.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mahant—Succession—Custom—Election—Validity of Election.

Where the founder of a math has not prescribed any rules to be followed in the appointment of succeeding mahants, the method of their selection depends upon the custom or usage which has prevailed in the math. An election of a mahant by persons who, according to the custom of the math, are qualified to elect a mahant, to be a valid election must be by a majority of the qualified persons assembled for that purpose; a separate election by a faction of the qualified persons is not a valid election.

APPEAL from a judgment and decree of the High Court (March 11, 1912) reversing a judgment and decree of the Subordinate Judge of Saharanpur (November 29, 1909).

The appeal related to the appointment of a mahant of a temple, belonging to the sect of nihang gossains, of which the principal gaddi was at Hardwar. The founder of the math died in 1849, without having laid down any rules as to the succession to the mahantship. The last mahant died in 1905, and the respondent was, at the dates of the suit and the appeal, in possession of the temple and of the properties appertaining thereto.

In 1909 the appellant instituted a suit against the respondent in the Court of the Subordinate Judge of Saharanpur. By his plaint he alleged, inter alia, that he was the sadhak (disciple) of the late mahant; that the mode of appointing the mahant of the temple was "that mendicants (fakirs) of all the ten classes (dasnam bhik) from Hardwar and its vicinity assemble at Hardwar on the thirteenth day ceremony after the death of the last mahant, and elect his sadhak provided he is fit to do the management"; and that he was duly appointed according to that

* *Present*: LORD DUNEDIN, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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custom. He claimed a decree for possession of the temple and properties, with mesne profits.

The respondent by his written statement denied, inter alia, that the appellant was sadhak of the late mahant and pleaded that it was not necessary that the sadhak should be elected; he alleged that according to the custom the sadhak, or a co-disciple, or a sadhak of a co-disciple of the deceased mahant could be appointed, and failing these that the dasnam bhik had power to appoint any fit person; he alleged that he was a co-disciple of the late mahant and was duly elected on February 24, 1905 (the thirteenth day after the death), by the dasnam bhik assembled at the temple. The facts and the nature of the evidence more fully appear from their Lordships' judgment.

The Subordinate Judge decreed the suit. He found that the appellant was sadhak of the deceased mahant and was duly elected by the dasnam bhik. He also found that according to the custom the sadhak of the deceased mahant had the first right to be elected.

The High Court (Griffen and Chamier JJ.) on appeal reversed this decision. The learned judges were of opinion that the evidence that the appellant was a sadhak was not satisfactory; they were unable to hold that a sadhak of the last mahant had, according to the custom of the math, a preferential right. They found that the respondent was elected inside the temple and that the appellant was elected outside; that the respondent "was elected by a large gathering of qualified persons" whereas the appellant's "election was a hole-and-corner affair in comparison . . . . and seems to have been carried out hurriedly by a discontented minority."

Sir Erle Richards, K.C., Parikh, and *N. G. Nadkarni,* for the appellant. The founder of the math having prescribed no rules as to the appointment of future mahants, the succession is governed by the custom of the math: *Genda Puri* v. *Chhatar Puri.*(1) The custom put forward by the appellant is that if there is a disciple of the last mahant, he alone is entitled to be elected, assuming that he is a fit and proper person. This

(1) (1886) L.R. 13 Ind. Ap. 100.

custom is in accordance with the general law in India that a mahant is appointed from among the disciples of the deceased mahant: *Gossain Dowlut Geer* v. *Bissessur Geer*(1); *Ramji Doss* v. *Lacchu Doss.*(2) The custom alleged by the respondent that the dasnam bhik could elect a person who was not a disciple is repugnant to the general law and to Hindu ideas. The principle of succession in the case of a mahant is based upon fellowship and personal association: *Khuggender Narain Chowdry* v. *Sharupgir Oghorenath.*(3) The findings of the Subordinate Judge both as to the custom and as to the fact of the appellant's election were in accordance with the evidence; his decree should be restored. [*Sheo Prasad* v. *Aya Ram*(4) was also referred to.]

De Gruyther, K.C., and *Dube*, for the respondent. The onus was on the appellant to prove by testimony the custom of the math upon which he relied: *Greedharee Doss* v. *Nundokishore Doss* (5); *Rajah Mutta Ramlinga* v. *Perianayagum Pillai*(6); *Rajah Vurmah Valia* v. *Ravi Vurma Mutha*(7); *Genda Puri* v. *Chhatar Puri.*(8) It was not proved that there was a custom that a disciple of the last mahant had a right to be elected. The math here is a punchaiti math and the appointment of a mahant must be by election: *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss.*(9) The evidence did not show that the appellant was elected by a majority of the dasnam bhik, but that he was chosen by a discontented minority outside the temple and after the respondent had been elected. An election to be valid must be made in good faith: *Ramalingam Pillai* v. *Vythilingam Pillai.*(10) The findings of fact in the High Court were right and the suit was properly dismissed. [*Srimati Janoki Debri* v. *Sri Gopal Acharjia*(11), *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*(12), and *Ramji Doss* v. *Lacchu Doss*(2) were also referred to.]

Sir Erle Richards, K.C., replied.

(1) (1873) 19 Suth. W.R. 215.
(2) (1902) 7 Calc. W.N. 145.
(3) (1878) I.L.R. 4 Calc. 543.
(4) (1907) I.L.R. 29 Allah. 663.
(5) (1867) 11 Moo. Ind. Ap. 405, at p. 428.
(6) (1874) L.R. 2 Ind. Ap. 209.
(7) (1876) L.R. 4 Ind. Ap. 76.
(8) L.R. 13 Ind. Ap. 100.
(9) (1839) 6 Beng. Sel. R. 262, at p. 268.
(10) (1893) L.R. 20 Ind. Ap. 150.
(11) (1882) L.R. 10 Ind. Ap. 32.
(12) (1889) L.R. 16 Ind. Ap. 137.

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March 15.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree of the High Court of Judicature at Allahabad, dated March 11, 1912, which reversed a decree of the Subordinate Judge of Saharanpur, dated November 29, 1909, and dismissed the suit with costs. The suit was brought on January 12, 1909, by Lahar Puri, who is the appellant, against Puran Nath, who is the respondent. The dispute between the parties to this appeal relates to the title to the mahantship of a Hindu math, or temple, at Hardwar, known as the Akhara Baba Sarwan Nath, and to the property appertaining to the math.

The math was founded by one Baba Sarwan Nath, who was a Sunniyasi Rukhar fakir and died in 1849. Since his death there have been several mahants of the math in succession. It does not appear that Baba Sarwan Nath, in founding the math, prescribed any rules or practice to be followed in the selection and appointment of the future mahants. Consequently, the selection and appointment of a person to be the mahant of the math on a vacancy occurring in the mahantship must depend on the custom or usage and the practices which have prevailed in the appointment of mahants of this math, and on that principle this suit has been fought in the first Court, in the High Court, and before this Board.

The dispute as to the title to the mahantship arose in February, 1905, on the death in that month of Jhandu Nath, who was the mahant of the math, and had succeeded Tej Nath in the mahantship in 1897. In this suit the plaintiff alleges that he was the only sadhak (disciple) of the deceased Mahant Jhandu Nath, and being the only sadhak of Mahant Jhandu Nath, he was the only one of the mendicant fraternity of the temple who was qualified for election to the mahantship; that he was duly elected mahant by the ten classes of mendicants (dasnam bhik) on February 24, 1905; and that he was appointed with the usual ceremonies. On the other side the defendant denies that the plaintiff had even been the sadhak of Mahant Jhandu Nath, or was qualified for election to the mahantship, or was elected mahant. The defendant's case is that it is not necessary that the sadhak of the last mahant should be elected as the mahant.

He alleges in his written statement that "The sadhak or a co-disciple, or the sadhak of a co-disciple of the deceased mahant is appointed a mahant, and failing these or in the event of none of these being a fit person, the mendicants of all the ten classes (dasnam bhik) have the power to make any fit person the sadhak of the gaddi and appoint him a mahant."

The defendant further alleges that he was a sadhak of Mahant Tej Nath, who preceded Mahant Jhandu Nath on the gaddi of the temple, and as such sadhak was qualified for election to the mahantship, and that he was duly elected and with the usual ceremonies was appointed mahant by all the ten classes of mendicants (dasnam bhik) on February 24, 1905. It is not disputed that the defendant was a sadhak of Mahant Tej Nath. It is common ground that the time for the election of a successor in the mahantship of this temple is the terhwin, the thirteenth day ceremony, after the death of the deceased mahant, which in this case fell on February 24, 1905. It is also common ground that on the death of a mahant of this temple the election of his successor takes place at Hardwar, and that the election and appointment of the new mahant is by the ten classes of mendicants (dasnam bhik) assembled at Hardwar for that purpose. From the evidence their Lordships infer that the usual place at which the dasnam bhik assemble for the purpose of electing a mahant of this temple and at which they elect a mahant is at the temple. Another common ground is that on the election and appointment of a mahant of this temple a mahantinama is drawn up and is witnessed by those who were present at the election, and is registered.

The defendant, who was the general attorney and storekeeper of the deceased mahant, is in possession of the temple and of the property appertaining to it. Consequently it is for the plaintiff to prove his right to the mahantship, which, if proved, would in the case of this temple carry with it the right to the possession of the temple and of the property appertaining thereto. If the plaintiff has failed to prove that he is the duly elected mahant of the math his suit must fail, and in that event it would be immaterial to consider whether the defendant is or is not the mahant of the math, or whether he has or has not

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any better title to the temple and the property which appertains to it than a title of mere possession.

Much evidence has been led by each side. The documentary evidence is not, in their Lordships' opinion, conclusive in favour of either side. The oral evidence is, as the High Court observed, extraordinarily conflicting, even for a case of this kind. Some of the material witnesses, who, if their evidence was true, must have been in a position to contradict or explain much of the evidence of the other side as to the events of February 24, 1905, were examined and were cross-examined at great length, but were allowed to leave the witness-box without their attention having been directed to the case of the other side. As the case was treated in the Court of the trial judge it was an important question whether there were on February 24, 1905, two elections of a mahant by the dasnam bhik, or one election only, or no real election at all. As the learned judges of the High Court observed in their judgment in the defendant's appeal before them, "The witnesses for the respondent (the plaintiff) say nothing about the election of the appellant (the defendant), and the witnesses for the appellant, with one or two exceptions, say nothing about the election of the respondent," and yet it is alleged that there were two elections on the morning of February 24, 1905, by the dasnam bhik then assembled at the temple.

The Subordinate Judge found as a fact that the plaintiff was the sadhak of Mahant Jhandu Nath. The learned judges of the High Court, after reviewing the evidence bearing on that question, and not overlooking the fact that it was a strong point in favour of the view which the Subordinate Judge had taken that a number of fakirs who were unlikely to choose a complete outsider had joined in the so-called election of the plaintiff as mahant, were on the whole unable to say that the evidence that the plaintiff had been duly appointed a sadhak was satisfactory. As the plaintiff had failed to satisfy the judges of the High Court that he had been a sadhak of Mahant Jhandu Nath, and as he had neither alleged nor proved that he was in any other way qualified for election as mahant of the math, they might have allowed the appeal and have dismissed the suit without going into the question as to whether he was or was

not elected. However, they did not dispose of the appeal before them on that point; they decided the appeal on the question as to whether the plaintiff had or had not been duly elected the mahant. In the view which their Lordships take of this case it is not necessary for them to decide whether or not the plaintiff had been a sadhak of Mahant Jhandu Nath.

The evidence as to the so-called elections on February 24, 1905, is most conflicting. Each party claims to have been elected mahant by the dasnam bhik on that day. That there were, in fact, two factions amongst the dasnam bhik—one faction desirous of electing the plaintiff as mahant, the other faction desirous of electing the defendant as mahant,—is on the evidence obvious. The Subordinate Judge found that it was satisfactorily proved that the plaintiff was duly elected mahant by the dasnam bhik on that day, and that the alleged election of the defendant as mahant was a fictitious transaction. The High Court found it proved that the defendant was elected on February 24, 1905, by a large gathering of qualified persons and that the election of the plaintiff was "a hole-and-corner affair in comparison with that of the appellant (the defendant), and seems to have been carried out hurriedly by a discontented minority" of the dasnam bhik which had assembled at the temple on the morning of February 24, 1905.

There is evidence to support each of these contradictory findings. If their Lordships were to confine their attention to the evidence as to what took place on February 24, 1905, it might be difficult to come to a conclusion as to the side on which the truth is to be found. The plaintiff's case is that he was elected at the temple that morning by the dasnam bhik, and that, having gone with his supporters to the Ganges to bathe before the completion of the ceremonies, they found on their return from bathing that the doors of the temple were closed, and they were obliged to complete the ceremonies at the hawili of the Rani of Landhaura, where he was installed, and that the bhandara, the customary feast on such occasions, took place at the Rani's hawili.

The plaintiff represented that he had been deceived by the defendant, and had believed until he returned from bathing that

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the defendant was favourable to his election. He represented that before he went to bathe the defendant had at the temple handed to him the ceremonial robes to be used at his installation and given him the mahantinama of Mahant Jhandu Nath as a precedent upon which his own mahantinama should be drawn up. The defendant's case was that he and he alone had been elected by the dasnam bhik at the temple on the morning of February 24, 1905, and that the ceremonies for the completion of his appointment as mahant had taken place at the temple.

Mahant Jhandhu Nath, being ill, went to Lahore and died there on February 12, 1905. There is some evidence, which their Lordships see no reason to doubt, that when at Lahore Mahant Jhandu Nath nominated the defendant as a fit person to succeed him in the mahantship. It is not suggested that Mahant Jhandu Nath had any power to appoint any one as his successor, but his nomination would probably have weight with the dasnam bhik. The plaintiff, even assuming for the moment that he was a sadhak of Mahant Jhandu Nath, had no experience in the management of the affairs of the math or of the property appertaining to the temple. On the other hand the defendant, who undoubtedly had been a sadhak of Mahant Tej Nath and a co-disciple of Mahant Jhandu Nath, had been for years the general attorney of Mahant Jhandu Nath and the storekeeper of the temple. On the death of Mahant Jhandhu Nath the defendant was early in the field preparing to secure his own election as mahant in succession to Mahant Jhandu Nath. The defendant and some supporters of his executed an agreement on February 18, 1905, by which they settled between them that the defendant should be the mahant and should be installed on the gaddi of Baba Sarwan Nath. The defendant before February 24, 1905, took at step which must have been notorious as indicating that he claimed to succeed Mahant Jhandu Nath; he filed an application in the Revenue Court in which he prayed that his name should be entered in the Revenue papers in respect of the property of the temple in place of that of the late Mahant Jhandu Nath. When the defendant was examined in this suit as to his application to the Revenue Court for mutation of names he, in answer to the pertinent question "How did you file an

application for mutation of names when you had not been elected a mahant?" replied, "We had settled the matter amongst ourselves." In reply to the interrogative observation on that answer, "The dasnam bhik had not settled the question up to that time?" the defendant said, "When Jhandu Nath was elected to the gaddi the dasnam bhik said that Puran Nath (the defendant) would be appointed mahant after Jhandu Nath; and on the tija day also the panches settled that Puran Nath would be appointed mahant."

It was the defendant who sent out the invitations to the mahants and other people to attend on the terhwin, the thirteenth day ceremony, when a mahant should be elected. None of the invitations have been produced, but from some of the replies which have been put in evidence it may be inferred that the invitations were to attend for the election of the defendant as mahant. It was the defendant who made the preparations for the bhandara, the customary feast, which was to take place at the temple on the day of the election of the mahant. That bhandara was held at the temple, and it is not pretended that the plaintiff and his supporters took part in it. The bhandara in which the plaintiff and his supporters took part was held at the hawili of the Rani of Landhaura. The plaintiff had then no money, but after he had been placed on the gaddi at the Rani's hawili he borrowed some money from one Swami Shimboo Gir and sent two Brahmans into the bazaar, who bought the things which were required for his bhandara.

According to some of the plaintiff's witnesses the defendant was present at the temple when it was settled by the dasnam bhik that the plaintiff had a right to the mahantship and should be appointed mahant, and did not object or claim that he, and not the plaintiff, should be elected mahant. Having regard to the facts to which their Lordsips have referred, it is impossible to believe that the defendant was assenting to the election of the plaintiff. There is a large body of evidence in support of the defendant's case that he was elected mahant on the morning of February 24, 1905.

The High Court has found that the majority of the persons present on the morning of February 24, who were qualified to

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elect a mahant of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for February 24, 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by dasnam bhik of a mahant to be a valid and effectual election must be by a majority of the dasnam bhik assembled for that purpose. A separate election by a faction of the dasnam bhik is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a mahant.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Solicitor for appellant: *Edward Dalgado.*
Solicitors for respondent: *Barrow, Rogers & Nevill.*

V. VENKATANARAYANA PILLAI (SINCE DECEASED) . . . . . } APPELLANT; J. C.*

AND

V. SUBBAMMAL AND ANOTHER . . . . . RESPONDENTS.

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Feb. 3; *March* 15.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Procedure—Reversioner—Suit to set aside Adoption by Widow—Death of Plaintiff—Right of Next Presumable Reversioner to continue Suit—Revivor of Appeal—Code of Civil Procedure (Act V. of 1908), s. 2, sub-s. 11; Order I., r. 1; Order XXII., rr. 1 and 3 (1).

In a suit by the next presumptive reversioner to set aside an adoption, or an alienation, by a Hindu widow the plaintiff sues in a representative capacity, and the contingent reversioners may be joined as plaintiffs under Order I., r. 1, of Act V. of 1908; where, therefore, in a suit of that character the sole plaintiff dies the right to sue survives, and the next presumable reversioner is entitled to be substituted for him and to continue the suit.

The appellant, as next reversioner, sued to set aside an adoption by a Hindu widow. The suit was dismissed by both Courts in India. After entering an appeal to the Privy Council, the appellant died. Upon a petition by the next resumable reversioner:—

Held, that the petitioner was entitled to be substituted for the appellant and to an order of revivor of the appeal.

PETITION for an order substituting the petitioner for the deceased appellant, and for an order for revivor of the appeal.

The deceased appellant, on August 1, 1907, instituted a suit in the High Court claiming a declaration that the adoption of the second respondent by the first respondent, a Hindu widow, was invalid and did not affect his reversionary interest. The circumstances appear fully from their Lordships' judgment.

The first respondent pleaded that she had authority to adopt under her deceased husband's will; the appellant's case was that a later will had the effect in law of revoking this authority.

The trial judge held that the authority to adopt was not revoked, and dismissed the suit. The High Court in its appellate jurisdiction affirmed this decision and granted leave to

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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appeal to His Majesty in Council. The appeal was entered on November 6, 1913, and on November 19, 1913, the appellant died. The present petitioner, Kuppusami Pillai, a grandson of the deceased appellant, was his sole heir and representative, and upon his (the appellant's) decease became the next presumptive reversioner.

Sir R. Finlay, K.C., and *Dube*, for the petitioner. If the appeal is not revived and prosecuted the petitioner and all other reversioners will be bound by the decree of the High Court as res judicata against them: *Chirovolu Punnamma* v. *Chirovolu Perrazu.*(1) That decision of the Full Bench is right and the later decision in *Arunachalam Pillai Minor* v. *Veliaya Pillai*(2) is erroneous.

De Gruyther, K.C., and *Kenworthy Brown*, for the respondents. The decision reported 23 Madr. L. J. 719 is right. The earlier case reported I.L.R. 29 Madr. 390 was decided upon its special facts; the learned judges who decided it were parties to the decision in the former case. Upon the death of the appellant the suit and proceedings abated; the decree is not res judicata against the petitioner. In Hindu law a reversioner has only a spes successionis; he claims as direct heir and not as successor to any other reversioner. Under s. 43 of the Specific Relief Act, 1877, the decree is only binding upon the parties and persons claiming through them. [Sect. 42 and illustrations (*e*) and (*f*) under that section were also referred to.] Order XXII., r. 1, of the Code of Civil Procedure, 1908, does not apply, as the right of the plaintiff to sue does not survive; the petitioner's right is a different right. The petitioner is not the "legal representative" within the meaning of s. 2, sub-s. 11, of the Code so far as relates to the claim in the suit. It is well established that a suit by a reversioner for a declaration that an alienation by a Hindu widow is invalid abates upon the death of the plaintiff and that a decree in a suit of that character is not res judicata against the other reversioners: *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(3); *Bhagwanta* v. *Sukhi*(4); *Govinda Pillai* v.

(1) (1905) I.L.R. 29 Madr. 390.
(2) (1912) 23 Madr.L.J. 719
(3) (1904) I.L.R. 27 Madr. 588.
(4) (1899) I.L.R. 22 Allah. 33.

Thayammal(1); *China Veerayya* v. *Lakshminarasamma.*(2) This view is supported by dicta of the Board: *Tekait Doorga Persad Singh* v. *Tekaitri Doorga Konwari*(3); *Isri Dutt Koer* v. *Mussamat Hansbutti Koerain.*(4) The same principles apply to a reversioner's suit to set aside an adoption. The petitioner could not have been joined as a plaintiff: *Rani Anund Koer* v. *Court of Wards*(5); there was no joint cause of action within Order II., r. 3, of the Code of 1908.

Sir R. Finlay, K.C., in reply. The Court has a discretion to allow a reversioner other than the next reversioner to be joined; Order II., r. 3, does not prevent that course. There is a distinction between suits to set aside an adoption and suits to declare a widow's alienation invalid. In any case the petitioner as legal representative is entitled to revive the suit to relieve the estate from the orders as to costs. [*Muthusami Mudaliar* v. *Masilamani*(6) and Order I., rr. 6 and 8, were referred to.]

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The judgment of their Lordships was delivered by

MR AMEER ALI. The question for their Lordshipss' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on July 29, 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid, and did not affect his (Venkatanarayana's) reversionary interest in the ancestral estate of one Venkatakrishna, deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband given under a will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent will. The Courts in India have held on the construction of

(1) (1904) I.L.R. 28 Madr. 57.
(2) (1914) I.L.R. 37 Madr. 406.
(3) (1878) L.R. 5 Ind. Ap. 149, at p. 163.
(4) (1883) L.R. 10 Ind. Ap. 150, at p. 157.
(5) (1881) L.R. 8 Ind. Ap. 14, at p. 22.
(6) (1909) I.L.R. 33 Madr. 342.

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this document that it did not amount to a revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on November 19, 1913.

The petitioner Kuppusami Pillai applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his lifetime was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as res judicata against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or spes successionis. But this possiblity is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian

law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (IX. of 1908) which deal with these two classes of suits differ widely in their language; art. 118, Sched. I., contains no restriction as to the person entitled to sue; whilst in art. 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character: one relates to status and involves the adjudication of a right in rem; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the procedure law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the lifetime of the alienor. In the first class of cases it has been recognized that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as a res judicata

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against the contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances when closely examined will be found, so far as the point for decision is concerned, to be the same. The test of res judicata applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather. What has to be considered is whether "the right to sue," in the words of the statute, "survives," and if it does, who can continue the action to obtain the relief that is sought.

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In the case of *Rani Anund Koer* v. *Court of Wards*(1) this Board gave expression to the principles applicable to suits by reversioners to impugn the validity of transactions by Hindu females. They said: "As a general rule such suits must be brought by the presumptive reversioner, that is to say by the person who would succeed if the widow were to die at that moment." But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question whether "the next presumable heir" is "the legal representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of

(1) L.R. 8 Ind. Ap. 14.

reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Order XXII., r. 1, in the new Civil Procedure Code of India (Act V. of 1908), which corresponds with s. 361 of Act XIV. of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provides that "Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in s. 2, sub-s. 11, of Act V. of 1908, which runs thus:— "'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Sub-s. 11 was embodied in Act V. of 1908 with the object of putting in statutory language the result of the decisions of the Indian tribunals on the meaning of the words "legal representative"; but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-s. 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Order I., r. 1, of Act V. of 1908, which brings the Indian practice into line with the English rule, provides as follows: "All persons may be joined in one suit as plaintiffs, in whom any right to relief in respect of, or arising out of, the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if

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such persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, namely, the validity or invalidity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Solicitor for petitioner: *John Josselyn.*
Solicitor for respondents: *Douglas Grant.*

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THE KING-EMPEROR . . . RESPONDENT. *March* 3.

Judicial Committee of the Privy Council—Conviction—Sentence of Death—Petition for Leave to Appeal—Stay of Execution of Sentence—Matter for Executive not for Committee.

Upon a petition to the Judicial Committee for leave to appeal from a conviction and sentence of death, the Judicial Committee will not express any opinion as to whether execution of the sentence shall be postponed pending the hearing of the petition or appeal, that question being one for the consideration of the Executive and not within the province of the Judicial Committee.

PETITION for special leave to appeal from convictions and sentences of death, and for postponement of the execution of the sentences until the hearing of the petition for special leave and, if granted, until the appeal.

The four petitioners were convicted by the Sessions Judge, Delhi, sitting with three native assessors, upon a charge, under the Indian Penal Code, ss. 120B and 302 (the former section being enacted by Act VIII. of 1913), of criminal conspiracy to murder in pursuance of which conspiracy a murder was committed. Three of the petitioners were sentenced to death and the fourth to transportation for life.

The petitioners appealed to the Chief Court of the Punjab, and the Crown applied to that Court to enhance the sentence upon the fourth petitioner.

The Chief Court affirmed the convictions and sentenced all four petitioners to death. The sentences were to be carried out a few days after the date of the present application, which was made on March 3, 1915.

Sir R. Finlay, K.C., and *Dube*, for the petitioners, stated that they were not at present in a position to proceed with the

* *Present*: VISCOUNT HALDANE, L.C., LORD DUNEDIN, LORD ATKINSON, SIR GEORGE FARWELL, and MR. AMEER ALI.

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petition for leave to appeal as the transcripts of the judgment of the Chief Court and of the evidence had not yet been received in England; they, however, asked the Board to make an order, or a recommendation to the Government of India, for the postponement of the carrying out of the sentences pending the hearing of the petition.

Dunne, for the Crown.

It was arranged that the petition for leave to appeal should be heard a fortnight after the receipt of the transcripts in England.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE, L.C. Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended.(1)

Solicitors for petitioners: *Barrow, Rogers & Nevill.*
Solicitor for respondent: *The Solicitor, India Office.*

(1) The petitioners were reprieved by the Government of India pending the hearing of the petition for leave to appeal. The petition was finally heard by their Lordships on April 27, 1915, and was dismissed, no ground of appeal being shown which, in their Lordships' opinion, brought the matter within the limited class of cases in which the Judicial Committee intervenes in criminal proceedings.

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SHRINIWAS PANDIT AND ANOTHER . RESPONDENTS. *Jan.* 21, 22, 25, 26, 27, 28, 29;

ON APPEAL FROM THE HIGH COURT AT BOMBAY. *March* 26.

Hindu Law—Adoption—Datta Homam—Not essential in same Gotra—Consent of Trustees—Documents contradicting Oral Evidence—Indian Evidence Act (I. of 1872), *s.* 145.

1. The performance of the ceremony of datta homam is not essential, even among Brahmans, to the legal validity of an adoption, where the adopted son belongs to the same gotra as the adoptive father.

2. Where a Hindu by his will has appointed five persons as trustees and authorized his widow to make an adoption with the consent of those persons, an adoption by her with the consent of the four of them who have proved the will and undertaken the trust, the fifth having declined to do so, is a valid exercise of the authority.

3. A Court is precluded, both on general principles and by the Indian Evidence Act, 1872, s. 145, from treating the oral testimony of a witness as rebutted by statements by him contained in documents in evidence, unless those statements have been put to the witness in cross-examination.

APPEAL from a judgment and decree of the High Court (September 23, 1910) reversing a judgment and decree of the Subordinate Judge of Poona (July 31, 1906).

The suit was instituted by the appellants to establish the validity of the adoption of the fourth appellant, Jagannath Vasudeo, as the son of Vasudeo Harihar Pandit, deceased (known as Baba Maharaj), and to obtain ancillary declarations.

Baba Maharaj, who was a Brahman by caste, died on August 7, 1897, possessed of considerable ancestral property, and leaving a widow, Sakvarbai, then about sixteen years of age, and three daughters. By his will he appointed five named persons (the three first appellants and two others) as trustees to carry on the management of his estates after his death. The will provided that if his widow Sakvarbai did not give birth to a son, or if a son should be born but should be short-lived,

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then "with the vichare" (i.e., the advice or consent) "of the above-named gentlemen" (namely, the persons named as trustees) "a boy should be given as often as may be necessary in adoption on the lap of my wife in accordance with the shastras." One of the five named trustees declined to act, but the other four took over the management of the estates in accordance with the will.

The appellants, three of the trustees and Jagannath, by their plaint alleged that on July 27, 1901, the last named was duly given and received on the lap of Sakvarbai in adoption, and that she executed a deed of adoption and signed a letter to the boy's father agreeing to receive him. The defendants were the widow, the remaining acting trustee, and the first respondent, a son subsequently adopted by Sakvarbai. The widow by her written statement denied the adoption and alleged that she was induced to sign the documents by the threats and coercion of the first two appellants. The other defendants adopted these defences.

A number of issues were settled, of which one was "whether the plaintiff No. 4 is the validly adopted son of Baba Maharaj." No issue was framed as to undue influence or coercion. The widow died before the trial, and the present second respondent, her daughter, was substituted for her.

The fourth appellant, the alleged adopted son, belonged to the gotra of the deceased Baba Maharaj.

The nature of the evidence, most of which was given on commission, appears from the judgment of their Lordships. The first and second appellants were examined and cross-examined, but no question was put to them as to the alleged threats or coercion, nor was this defence put forward at the trial.

The Subordinate Judge found on the evidence that the corporeal giving and taking of the fourth appellant in adoption was proved; he held that no religious ceremonies were legally necessary, since the boy was of the same gotra as his adoptive father and the adoption was intended to be complete without them.

The High Court (Chandavarkar and Heaton JJ.) reversed the decision of the Subordinate Judge, holding that there had not in

fact been any giving and taking of the boy in adoption, and that in any case the adoption had been brought about by undue influence exercised upon the widow by the first and second appellants. The learned judges, therefore, did not find it necessary to consider the question as to whether the datta homam, or other religious ceremony, was essential to the validity of the adoption.

Sir Erle Richards, K.C., Sir William Garth, and *Parikh,* for the appellants. The finding of the Subordinate Judge that the boy was given and received on the lap of the widow was in accordance with the evidence. No doubt coercion or undue influence, if pleaded and proved, would be a defence: *Bayabai* v. *Bala.*(1) There was, however, no issue framed as to either coercion or undue influence, and the trustee appellants were not cross-examined to establish either of those defences. The undue influence found by the High Court was not pleaded, nor was it suggested at the trial; this defence should, therefore, not have been entertained upon appeal: *Abdool Hoosein Zenaii Abadim* v. *Turner.*(2) The trustee appellants were not personally interested in the transaction, and the evidence shows that the widow desired to make an adoption.

The giving and receiving of the boy upon the lap was sufficient to validate the adoption, without any further ceremony. In Madras it has been expressly decided that even among Brahmans the datta homam is not essential to the legal validity of an adoption: *Singamma* v. *Vinjamuri Venkatacharlu*(3); Strange's Hindu Law (1830), vol. 1, pp. 96 and 97. In any case the datta homam is not essential, nor indeed applicable, where the adopted son is of the same gotra as the adoptive father: *Govindayyar* v. *Dorasami*(4); *Ranganayakammav. Alwar Setti*(5); *Atma Ram* v. *Madho Rao*(6); *Valubai* v. *Govind Kashinath*(7); Steele's Law and Custom (1868), pp. 46 and 184; Strange's Hindu Law (1830), vol. 2, pp. 89, 104, 219.

(1) (1866) 7 Bomb. H.C. App. 1, p. 1.
(2) (1887) L.R. 14 Ind. Ap. 111.
(3) (1868) 4 Madr. H.C. 165.
(4) (1887) I.L.R. 11 Madr. 5.
(5) (1889) I.L.R. 13 Madr. 214.
(6) (1884) I.L.R. 6 Allah. 276.
(7) (1899) I.L.R. 24 Bomb. 218.

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Sir R. Finlay, K.C., De Gruyther, K.C., and *Lowndes*, for the first respondent. The evidence did not establish that there was a giving and receiving with intent to adopt; the oral evidence of the appellants was inconsistent with the documents. The findings of fact of the High Court were right. Further, the adoption was invalid since the datta homam was not performed. Among Brahmans that ceremony is essential to the validity of an adoption: Mitakshara, ch. 1, s. 1, vv. 13 et seq.; Dattaka Mimansa, s. 2, v. 51; Dattaka Chandrika, s. 2, vv. 16 and 17, s. 6, v. 3. In Bombay the datta homam has always been held to be essential among Brahmans, except upon the adoption of a daughter's son or a brother's son, an exception founded upon a text of Yama: *Huebut Rao* v. *Govind Rao*(1); *Valubai* v. *Govind Kashinath*(2); West and Buhler (1884 ed.), pp. 1082 to 1084, pp. 1123 to 1125. An exception in favour of an adoption in the same gotra has never been recognized in Bombay, and is inconsistent with the above exception, since a daughter's son belongs to a different gotra. The decisions in Madras are wrong and were largely based upon an obiter dictum in *Sootrugun Sutputty* v. *Sabrita Dye.*(3) That case shows that in any event the absence of the datta homam gives rise to great suspicion as to the factum of adoption. [*Mahashoya Shosinath Ghose* v. *Krishna Soondari Dasi*(4) and *Ganga Baksh* v. *Janki Singh*(5) were also referred to.]

Dunne and *Syed Abdul Majid*, for the second respondent. We adopt the arguments on behalf of the first respondent. Further, the will required that all five of the named trustees should assent to an adoption. In any case only the four acting trustees were consulted as to the adoption of the fourth appellant, and the evidence shows that one of those four, Nagpurkar, dissented. The adoption was consequently not in accordance with the authority given and was invalid. The subsequent adoption of the first respondent was also invalid since the trustees did not assent to it.

(1) (1823) 2 Borr. (1825) ed.), p. 75, at p. 255.
(2) I.L.R. 24 Bomb. 218.
(3) (1864) 2 Knapp., 287, at p. 290.
(4) (1880) L.R. 7 Ind. Ap. 250,
(5), (1887) Oudh Rulings (1874-1893), 81.

No reply was called for.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a decree of the High Court of Judicature at Bombay, dated September 23, 1910, which reversed the decree of the First Class Subordinate Judge at Poona, dated July 31, 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudeo Harihar Pandit, alias Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds —first, that it was never completed in fact. This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular that he was not taken upon the lap of the adoptive mother. Secondly, that the religious ceremony of datta homam, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The third ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion, and undue influence are all mixed together. The disentangling of these separate and separable grounds of defence must undoubtedly have caused certain difficulties in the Court below. But the challenge appeared to their Lordships to preserve even at the Bar of the Board this mixed or jumbled character.

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The facts of the case, briefly stated, are these: The late Baba Maharaj was a first-class sardar of the Deccan. He died at Poona on August 7, 1897, leaving a young widow, Sakvarbai, also called Tai Maharaj. At the date of his death he made a will appointing five gentlemen as his trustees. One of these, Rao Sahib, declined to act; the other four obtained probate of the will on December 2, 1897. These were the appellants, Messrs. Tilak, Khaparde, and Kumbhojkar; the fourth, Mr. Nagpurkar, while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the will.

In the will the clause material to the questions of adoption and succession is as follows: "My wife, Saubhagyavati Shri Sakvarbai, is now pregnant. If she does not give birth to a son, or if the son after birth is short-lived, then, for the purpose of continuing the name of my family, with the vichare of the above-mentioned gentlemen, a boy shoud be given as often as may be necessary in adoption on the lap of my wife in accordance with the shastras, and the above-mentioned panch should, on behalf of that son, carry on the management of the immovable and movable estate until he attains majority."

On January 18, 1898, the widow gave birth to a son, but he died within two months thereafter, namely, on March 9. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. It is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent inquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On June 18, 1901, a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the

substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none were approved. The minute in this particular is of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground that they were too old. One boy, the youngest named, of eleven years, is, however, stated to be in point of age suitable, although delicate. The minute then proceeds: "The only family which remains, therefore, is that descended from the brother of Shri Siddeshwar Maharaj at Babre. It is not yet known whether there is a boy or not in that family. But if there is a boy of that family, fit in point of age, &c., for adoption, it is our unanimous opinion that one should not be taken from any other family. And Shri Tai Maharaj is of the same opinion. Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganesh Shrikrishna Khaparde should both go to Babre, select boys, and return after settling as regards that family. Shri Tai Maharaj should go, see boys, and approve."

It should be mentioned that the trustees were, and had been since the the testator's death, duly administering the testator's estate.

What followed upon the proceedings of June 18 was that Messrs. Tilak and Khaparde accompanied the widow to Aurangabad, where the widow remained; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath; and her personal likings appeared to point in the same direction.

All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at Aurangabad it is sufficient to say that,

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in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and the horoscopes of the astrologers all pointing in one direction, on June 27 a meeting of the shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he agreed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a moghlai, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child these documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by his natural father to his adoptive mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus on occasion of adoption, and—all being completed—the formal ceremonies and festivities were postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, he has weighed and considered every argument presented, and he has come to the conclusion that the adoption was in fact completed. Notwithstanding the judgment of the learned judges of the High Court of Bombay, their Lordships have no hesitation whatever in entirely agreeing with the judge of first instance. Reference in a little time will be made to the reasons assigned by the

High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption, and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high position and some of them of learning and legal training, are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper, to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of ten or twelve witnesses, five witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not was disbelieved by the judge of first instance, a verdict with which the High Court saw no ground for interfering.

It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the words "selected" and "decided" refer

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to something in the future. It is also undoubtedly true that both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lordships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says: "Here there was a clear direction of the husband to this wife to adopt, the wife after his death was anxious to carry out the direction. There is no evidence to prove that any effort or cajolery was practised upon her, or that there was any suppression or concealment of facts from her; the plaintiffs had no personal interest whatever." In another passage of his judgment he remarks: "The evidence clearly shows, and it is undisputed, that on the 27th there was selection and verbal gift, and acceptance, and preparation of necessary documents. On the 28th there was execution of documents under corporeal acts of giving and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can reasonably be suggested for them maintaining or testifying that the adoption of the boy mentioned was made, except that this truly represented that which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, ten or twelve persons in all.

"The account unquestionably, to my mind," says Chandavarkar J., "given by the witnesses appears to be a true account of many of the series of events, and a false account of at least one, and that the most important." This event is the taking of the child on the lap. Later on in his judgment he states: "We are driven to believe that a considerable number of men of good position have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying this verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Chandavarkar J. observes that "they were men of mature years, of exceptional education and mental qualities, lawyers and men of affairs of great repute and good standing, and both men of dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is a priori difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurangabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. On August 19 she went through the form of another adoption, namely, of Bala Maharaj, a married man older than herself, as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on September 30, 1903. Her daughter, who was, on her death, admitted to the suit as defendant, challenges not only the first adoption, but the second adoption also—her interest being to maintain that the provisions of the testator's will with regard to adoption had failed, that the widow became the owner of the estate as heiress to her infant son who had died, and that the property passes in this way to her heir.

It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury.

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Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under s. 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds, "when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way," or under the other circumstances there stated. Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings, as above described, were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned judges of the High Court with a view to rebutting

it. Their Lordships think it right to observe that, in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear. Fortunately the law of India pronounces no uncertain sound upon the same matter. By s. 145 of the Indian Evidence Act, 1872, it is provided that "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to the matters in question without such writing being shown to him or being proved; but if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—none the less sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the

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inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton J. deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced. The learned judges have come to a conclusion which would be in some respects in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of datta homam, which ceremonial is declared to be essential to its legal validity. Datta homam is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities,

ancient and modern, are not in accord on the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these, except when the law is clear, into the legal sphere, so as to affect or impair personal or patrimonial rights.

The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulengaswami* v. *Sri Balusu Ramalakshmamma.*(1)

That appeal had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahmanical influence was most predominant one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes, "The further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers, accustomed to treat as law what they found in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers." The case resulted in the decision that the adoption of an only son is not null and void under the Hindu law.

The question whether the datta homam is a legal requisite in

(1) (1889) L.R. 26 Ind. Ap. 113.

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Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvass or call in question any dicta upon that general point, nor does the question arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Dorasami*(1) or of the Madras High Court in *Singamma* v. *Venkatacharlu*(2), both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of datta homam is not essential to a valid adoption among Brahmans in Southern India. For in the opinion of the Board the necessity does not arise where the child to be adopted belongs to the same gotra as that of the adoptive father. It is an admitted fact that this was so in the present case. Their Lordships have come clearly to the conclusion that where this is so in fact, then the law of India is that the celebration of the ceremony of datta homam is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a brother's son, or of a daughter's son. In decided cases this may have been the relationship in fact, but the principle of all the decisions, and, in their Lordships' opinion, of all the authorities, is that within the same gotra the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Jenkins C.J. in the case of *Valubai* v. *Govind Kashinath*(3), the decision being to the effect that among Brahmans in the Presidency of Bombay the performance of the datta homam ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship, but upon the broad ground of the identity of gotra. Mr. Colebrooke's annotation upon Mitakshara, ch. 2, s. 5, is as follows: "Gotraja or persons belonging to the same general family (gotra) distinguished by a common name, these answer nearly to the gentiles of the Roman law."

(1) I.L.R. 11 Madr. 5. (2) 4 Madr. H.C. 165.
(3) I.L.R. 24 Bomb. 221.

A good illustration of the point has reference to the law applicable to the Sudra caste. The use of the datta homam is not necessary for adoption within that caste, and why? The explanation is given in a sentence by Strange in his Hindu Law (vol. 2, p. 89) in which it is laid down that "Ceremonial adoption cannot be necessary in the case of a Sudra, since by the datta homam the adopted son is offered from the stock (gotram) of the natural to that of his adopted father; and Sudras have no gotra." It may be added that in the treatment in the same volume, p. 104, of the celebration of the Upanayana rite, or the investiture with the sacred thread, this is laid down: "With respect to the non-eligibility of a person for adoption on whom the Upanayana rites have been performed, it is much disputed. The more reasonable opinion would appear to be that he is eligible if of the same gotra (family); non-eligible if of a different gotra from the adopter; that if of the same gotra the datta homam, though proper, is not necessary."

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in the last-mentioned judgment of the learned Jenkins C.J. In their opinion accordingly this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne(1) that "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are

(1) See *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685, at p. 697.

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insufficient even to amount to an averment of fraud of which any Court ought to take notice." The law of India is in no way different from this, and it has been decided over and over again, e.g., in *Gunga Narain Gupta* v. *Tiluckram Chowdhry*.(1)

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any one of the well-known categories of attack was settled for trial, the only issue on the subject being whether the plaintiff, No. 4, is a validly adopted son of Baba Maharaj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this: The will of the testator prescribing an adoption was clear; the wish of the widow and the trustees alike to follow it was clear; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the gotra, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her or that there was any suppression or concealment of facts from

(1) (1888) L.R. 15 Ind. Ap. 119.

her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There is nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect, that "The question here is difficult, she was indeed willing to adopt, but was she a free agent when she adopted the fourth plaintiff, assuming that she adopted him, or was she forced into it against her will by unconscientious means used by the first two plaintiffs, that is, Messrs. Tilak and Khaparde, and unfair advantage taken by them of her ignorance and youth, and of other fiduciary relations between them?"

The citation just made is from the notes of Chandavarkar J. With much respect to the learned judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned. It is needless to ask whether this implies fraud because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout its whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import pro tanto a disqualification and disability into the position of reputable men.

A reference is made in the High Court to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of

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the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows: Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise. The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate by violation of her husband's dying wishes, and at the price of sacrificing his soul's happiness. Their Lordships are not of opinion that it was any part of the duty of the trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor second adoption was valid. The only separate point relied on was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees; but in their Lordships' opinion that question does not arise; because he did in fact not dissent, but consent. His dissent, or alleged dissent, was subsequently made under circumstances into which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the

appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for appellants: *Downer & Johnson.*
Solicitors for first respondent: *T. L. Wilson & Co.*
Solicitor for second respondent: *E. Dalgado.*

PUTTU LAL AND OTHERS . . . . . APPELLANTS;

AND

PARBATI KUNWAR AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

J. C.* 1915 *April* 15, 16; *May* 5.

Hindu Law—Adoption—Widow adopting Brother's Son—Validity—Authority of Dattaka Mimansa.

A Hindu widow making an adoption by virtue of her deceased husband's authority can validly adopt her brother's son.

Jai Singh Pal Singh v. *Bijai Pal Singh* (1904) I.L.R. 27 Allah. 417 approved.

The Dattaka Mimansa is a work of high authority and has become embedded in Hindu law, but caution is required in accepting the glosses of its author where they deviate from or add to the Smritis.

APPEAL from a judgment and decree of the High Court (December 15, 1909) reversing a judgment and decree of the Subordinate Judge of Mainpuri (May 18, 1908).

One Gandharp Singh, a wealthy Brahman, died childless in November, 1898, leaving him surviving as his sole heir according to Hindu law his widow, the first respondent. On June 17, 1902, she executed a deed by which she declared that, with the oral permission of her late husband, she had adopted the second respondent, who was her brother's son and then about twelve years of age.

On June 17, 1907, the appellants instituted the suit, claiming to be reversionary heirs of Gandharp Singh, and praying for a declaration that the alleged adoption was invalid.

* *Present*: LORD DUNEDIN, LORD ATKINSON, SIR GEORGE FARWELL, and SIR JOHN EDGE.

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The Subordinate Judge held that the ceremony of adoption did in fact take place, but neither at the time nor with the publicity alleged by the respondents, and without the authority of Gandharp Singh. While recognizing that it was his duty to follow the decision of the High Court in *Jai Singh Pal Singh* v. *Bijai Pal Singh*(1), in which it was held that a widow could validly adopt her brother's son, the learned Subordinate Judge, upon an elaborate discussion of the texts, expressed the view that the adoption was invalid according to Hindu law. He made a decree in favour of the plaintiffs (appellants).

The High Court (Sir J. Stanley, C.J. and Banerji, J.) concurred in the finding of the Subordinate Judge that the adoption had in fact taken place, but differed from his finding as to the authority, which they held to be established by the evidence. The learned judges pointed out that upon the question of the validity of a widow's adoption of her brother's son the Subordinate Judge was bound by the previous decision of the High Court above referred to, and they did not consider it necessary further to discuss that question.

Lowndes, for the appellants. Upon the evidence the alleged oral authority to adopt was not established. But if it were, the adoption by the widow of her brother's son was invalid. The Dattaka Mimansa (s. 2, vv. 33 and 34, and s. 5, v. 16) contains a definite prohibition against a widow adopting her brother's son. The very high authority of the Dattaka Mimansa appears from the judgments in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*(2) and *Bhagwan Singh* v. *Bhagwan Singh*.(3) The following modern authorities support the view that the adoption is invalid: Strange's Hindu Law, ch. iv., par. 2 (6th ed.), p. 83; Sir F. Macnaghten's Considerations of Hindu Law (1824), p. 170; W. H. Macnaghten's Hindu Law (1839), vol. i., p. 67; West and Buhler's Digest (3rd ed.), p. 1032; and it was directly so held in *Musammat Battas Kuar* v. *Lachman Singh*.(4)

(1) I.L.R. 27 Allah. 417.

(2) (1899) L.R. 26 Ind. Ap. 113, at p. 131.

(3) (1899) L.R. 26 Ind. Ap. 153, at p. 161.

(4) (1875) 7 N.W.P.H.C. 117.

A widow is precluded from adopting a son whom she could not have procreated with the natural father without incest. The prohibition is connected with the obsolete custom of niyoga, under which a sapinda or other person was appointed to procreate upon a wife or widow a son to a sonless man. The authorities all support the prohibition down to the publication of Mayne's Hindu Law in 1878. His view (see Mayne's Hindu Law, 7th ed., par. 137, p. 176) cannot weigh against the great authority of the Dattaka Mimansa. In *Sriramulu* v. *Ramayya*(1) the adoption was by the husband; that case is, therefore, not in point. The decisions in *Bai Nani* v. *Chunilal*(2) and *Jai Singh Pal Singh* v. *Bijai Pal Singh*(3) are erroneous. [*Vellanki Venkata Krishna Row* v. *Venkata Narsayya*(4) was also referred to.]

[Their Lordships intimated that they only required to hear the respondents' counsel upon the question whether the adoption was invalid in law.]

De Gruyther, K.C., and *Dube*, for the appellants. The decision and reasons in *Jai Singh Pal Singh* v. *Bijai Pal Singh*(3) were right. The prohibition against a widow adopting her brother's son contained in the Dattaka Mimansa is not to be found in the Dattaka Chandrika, nor is it supported by the Smritis. It is a mere gloss of the author's. It is not a principle of Hindu law that a widow cannot adopt a son whose father she could not have married. The passage in Dattaka Mimansa, s. 5, v. 16, is taken from Dattaka Chandrika, s. 2, v. 8; it means that the son to be adopted should be one of the twelve kinds of sons recognized by the Smritis, and referred to in Mayne's Hindu Law, 7th ed., par. 67, p. 81. The anomalous results which would follow if the niyoga test were applied are pointed out in *Bai Nani* v. *Chunilal*.(2) Mandlik rightly describes niyoga as being "a mere fossilized relic of the past" and as having no bearing upon the question: Hindu Law, pp. 480—482. The passage relied on in West and Buhler shows that adoptions of the kind referred to were recognized in practice. A husband can adopt his wife's brother's son; this would not be the case if the principle contended

(1) (1881) I.L.R. 3 Madr. 15.
(2) (1897) I.L.R. 22 Bomb. 973.
(3) I.L.R. 27 Allah. 417.
(4) (1876) L.R. 4 Ind. Ap. 1.

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for applied. An adoption by a widow under her husband's authority is made on behalf of the husband; the question of her relationship to the adopted son is therefore not material: *Chowdry Pudum Singh* v. *Koer Oodey Singh*.(1) [*Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(2); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*(3); (as to meaning of "adya") *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*(4); Dattaka Mimansa, s. 1, vv. 19—21, s. 2, v. 28; Jolly's Hindu Law, pp. 162 and 163; and Mayne's Hindu Law, 7th ed., par. 112, p. 142, were also referred to.]

Lowndes replied.

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The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal by the plaintiffs from a decree of the High Court of Judicature at Allahabad, dated December 15, 1909, which reversed a decree of the Subordinate Judge of Mainpuri, and dismissed the suit with costs.

The plaintiffs brought their suit in the Court of the Subordinate Judge of Mainpuri, on June, 15, 1907, to have it declared that Jwala Parshad, who is a defendant and one of the respondents, was not the adopted son of one Tiwari Gandharp Singh, deceased, who had been the husband of Musammat Parbati Kunwar, who is the other defendant and respondent. The adoption which is impugned was made by Musammat Parbati Kunwar in March, 1899, to her deceased husband, Tiwari Gandharp Singh, who had died on November 9, 1898, without issue surviving him, and had been a Brahman. Jwala Parshad was the son of a brother of Musammat Parbati Kunwar. The plaintiffs, who claimed as reversioners, denied that Jwala Parshad had been in fact adopted, and alleged that Tiwari Gandharp Singh had not given to Musammat Parbati Kunwar authority to adopt Jwala Parshad to him, and further alleged that Jwala Parshad, being a son of a brother of Musammat Parbati Kunwar, was in law ineligible for adoption by her as a son to her deceased husband.

(1) (1869) 12 Moo. Ind. Ap. 350.
(2) (1868) 12 Moo. Ind. Ap. 397, at p. 436.
(3) (1878) L.R. 5 Ind. Ap. 40.
(4) (1912) L.R. 39 Ind. Ap. 121, at p. 128.

The Subordinate Judge framed six issues; two only of the issues are now of importance. It was concurrently found by the Courts below that the adoption was in fact made. The two issues which have to be decided in this appeal are as framed by the Subordinate Judge:—

"(4.) Did Gandharp Singh give permission to his wife to adopt Jwala Parshad?"

"(6.) Is the adoption invalid, inasmuch as the boy is the son of the adoptive mother's brother?"

The authority to adopt Jwala Parshad was alleged to have been given to Musammat Parbati Kunwar by an oral will of her husband, Tiwari Gandharp Singh, a few days before his death. The Subordinate Judge held that the evidence that the authority to adopt Jwala Parshad had been given was untrustworthy, and found that no authority to adopt Jwala Parshad was proved to have been given.

The High Court on appeal saw no reason whatever for doubting the trustworthiness of the evidence of the witnesses who had deposed to the fact that Tiwari Gandharp Singh had given permission to his wife to adopt Jwala Parshad as a son to him, and after a careful consideration of the evidence and the surrounding circumstances found as a fact that the permission to adopt Jwala Parshad had been given. In their Lordships' opinion the learned judges of the High Court could have come to no other conclusion unless they had perversely disregarded the evidence and all the probabilities of the case. The direct evidence that the authority to adopt Jwala Parshad had been given by Tiwari Gandharp Singh to his wife was clear, and in their Lordships' opinion was unassailable, and other facts showed that it was probable that such an authority would be given. Tiwari Gandharp Singh was a man well advanced in years; he had been thrice married; he had no surviving issue; there was no sagotra sapinda in his family; he was the last of the male line; he was a man of some considerable estate and position; and he had taken Jwala Parshad, when a child of four or five years of age, to live in his house with the object of adopting him as his son, should Jwala Parshad prove himself to be a boy worthy of adoption as his son. Their Lordships agree with the finding of

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the High Court that the authority to adopt Jwala Parshad had been given. That authority was not a general authority to Musammat Parbati Kunwar to adopt a son to Tiwari Gandharp Singh, it was a specific authority to her to adopt Jwala Parshad as the son to her husband.

There remains to be considered the question of law raised by the sixth issue which had been framed by the Subordinate Judge. The Court of the Subordinate Judge of Mainpuri is a Court which is subordinate to the High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature. As the Subordinate Judge was well aware, it had been decided five years before this suit was instituted by a Bench of the High Court at Allahabad, composed of Sir John Stanley, the then Chief Justice, and Banerji, J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh*(1), that an adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's grandson or son is not, according to Hindu law, an invalid adoption, as the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband, and that the test of eligibility of the adopted son for adoption in such case must be the test which would have applied had the adoption been made by the husband himself in his lifetime.

The Subordinate Judge of Mainpuri, Chhajju Mal, professing disapproval of that decision of the High Court, which he was bound to follow, entered upon a consideration of Sanskrit texts bearing more or less upon the subject, and decided that as Musammat Parbati Kunwar could not have married her brother, the father of Jwala Parshad, the adoption of Jwala Parshad was invalid. It is difficult to follow the arguments of the Subordinate Judge, but he does not appear to have kept clearly before his mind that the question in this case was whether a Hindu widow,

(1) I.L.R. 27 Allah. 417.

acting on her husband's authority, could validly adopt as a son to him the son of her brother, and was not the question as to whether a Hindu female could validly adopt to herself a son of her brother. On appeal, Sir John Stanley C.J. and Banerji J. applied the decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh*(1), which had not been overruled, and accordingly decided that the adoption of Jwala Parshad was a valid adoption, and by their decree dismissed the suit with costs. From that decree of the High Court this appeal has been brought.

The foundation of the decision of the Subordinate Judge on this question of Hindu law is the Commentary of Nanda Pandita, which is known as the Dattaka Mimansa. The Dattaka Mimansa is undoubtedly a high authority on the law of Hindu adoption and is treated with respect. The authority of the Dattaka Mimansa was considered by this Board in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*(2) and in *Bhagwan Singh* v. *Bhagwan Singh*(3), and the view of this Board was that the Dattaka Mimansa is a work which has had a high place in the estimation of Hindu lawyers in all parts of India and has become embedded in Hindu law, but that caution is required in accepting the glosses of Nanda Pandita, its author, where they deviate from or add to the Smritis. It was pointed out by Banerji J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh*(4), on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, that Nanda Pandita in the Dattaka Mimansa extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the Smritis or institutes of sages.

As Banerji J. further pointed out in the same case, the extension of the rule by Nanda Pandita is not supported by any text of the Dattaka Chandrika, or by any of the texts of the sages Sannaka and Sakala from which most of the rules of the Dattaka Mimansa were deducted. It has not been shown to their Lordships that

(1) I.L.R. 27 Allah. 417.
(2) L.R. 26 Ind. Ap. 113.
(3) L.R. 26 Ind. Ap. 153.
(4) I.L.R. 27 Allah. at p. 433.

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the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as adoptions by widows to their deceased husbands are concerned. It is true that in the case of *Musammat Battas Kuar* v. *Lachman Singh*(1) Pearson and Spankie JJ. said: "No sufficient reason is shown why the doctrine of Nanda Pandita that a woman may not affiliate a brother's son should not be accepted as correct, and why it should not apply to the case of a woman adopting a son with the sanction and on behalf of her husband. Indeed, it does not appear that the Hindu law contemplates or provides for the adoption by a widow of a son in her own right."

It was not necessary for these learned judges to express any opinion on the subject, nor is it clear how the case came on appeal to the High Court, as the two Courts below had concurrently found that it was not proved that the husband had given his wife authority to adopt a son.

It is quite clear that Tiwari Gandharp Singh could, in his lifetime, have legally adopted Jwala Parshad, the son of his wife's brother, and had he done so the adoption would have been a valid adoption, and their Lordships fail to see any reason why Jwala Parshad, who was legally eligible for adoption by Gandharp Singh, should have become ineligible by reason of the death of Gandharp Singh. It must be remembered that the adoption was not by the widow in her own right and to herself; the adoption was to her deceased husband and under the authority which he had given to her. In *Sriramulu* v. *Ramayya*(2) the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to their relationship prior to marriage. In *Bai Nani* v. *Chunilal*(3) it was held that the adoption by a Hindu widow of her brother's son was valid. Their Lordships have not thought it necessary to discuss the texts and authorities which have been referred to and are relevant to this question, as they have been fully and exhaustively considered by Sir John Stanley C.J. and

(1) 7 N.W.P.H.C. 117. (2) I.L.R. 3 Madr. 15.
(3) I.L.R. 22 Bomb. 973.

Banerji J. in their judgments in *Jai Singh Pal Singh* v. *Bijai Pal Singh*.(1)

This appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

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PADARATH AND OTHERS . . . . . APPELLANTS;

AND

RAM NAIN UPADHIA AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

J. C.* 1915 *May* 13, 14; *June* 3.

Mortgage—Attestation of Deed—Pardanishin Executants—Identification by Voice—Transfer of Property Act (IV. of 1882), *s.* 59—*Waiver of Right of Priority.*

A mortgage deed purported to be executed by two pardanishin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognized their voices:—

Held, that the deed was duly attested in accordance with the Transfer of Property Act, 1882, s. 59.

First mortgagees of two villages did not appeal from a decree by which, in error, their mortgage rights against one of the villages were subordinated to those of second mortgagees of that village. They subsequently sued to enforce their mortgage against the other village in the hands of auction purchasers from the mortgagors:—

Held, that the first mortgagees were not precluded from fully enforcing their security against the auction purchasers.

CONSOLIDATED APPEALS from judgments and decrees of the High Court (March 29, 1909) varying a judgment and decree of the Subordinate Judge of Jaunpur (May 25, 1905). The suit was instituted by certain of the respondents as mortgagees under

* *Present*: LORD ATKINSON, SIR JOHN EDGE, and MR. AMEER ALI.

(1) I.L.R. 27 Allah. 417.

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a deed dated June 25, 1892, for a decree for sale of part of the properties comprised therein. The mortgagors under the deed in question were two Mahomedan pardanishin ladies.

The Subordinate Judge passed a decree in favour of the plaintiffs as to part of their claim. The High Court, upon appeal, allowed the claim in full.

The appeal originally came before the Judicial Committee for argument on February 12, 1913, when the appellants relied on the judgment in *Shamu Patter* v. *Abdul Kadir Ruvuthan*(1) (which had been decided by the Judicial Committee subsequently to the decision of the High Court in the present case) and contended that the mortgage deed was unenforceable by reason that it was not duly "attested by two witnesses" within the meaning of the Transfer of Property Act (IV. of 1882), s. 59. This objection had not been raised in the High Court or before the Subordinate Judge.

The Judicial Committee remitted the case in order that evidence might be taken as to the method of attestation. Upon that evidence, the nature of which appears from their Lordships' judgment, the learned judges of the High Court differed in opinion as to whether the deed had been duly attested. The learned Chief Justice after reviewing the evidence, part of which he disbelieved, said: "if, therefore, it was absolutely necessary that two of the witnesses to the mortgage should have actually seen the ladies write their names, I cannot hold that this has been proved; I believe that the ladies signed the deed behind the pardah and that none of the witnesses saw them sign." He accordingly held that the deed was not admissible in evidence. Banerji J. differed, finding upon the evidence that the executants, when they signed the deed, were so placed behind a doorway that their hands in affixing their signatures extended beyond it, and that although the witnesses could not see the faces of the executants they saw the signatures placed upon the document.

The facts as to the further question which arose upon the appeal, namely, whether in the events which had happened the respondents were entitled to enforce their claim under the mortgage against the village of Baragaon in the appellants'

(1) (1912) L.R. 39 Ind. Ap. 218.

possession, appear from their Lordships' judgment. The question as to the attestation was argued as a preliminary point.

Sir Erle Richards, K.C., and *Kenworthy Brown*, for the appellants. The deed was not duly attested within the meaning of s. 59 of the Transfer of Property Act, 1882. The observations in *Ganga Dei* v. *Shiam Sundar*(1), that in the case of a pardanishin woman a wider construction ought to be placed upon the word "attested" as used in the section than in the case of other persons, must be taken to have been disapproved by the judgment of the Board in *Shamu Patter* v. *Abdul Kadir Ruvuthan*.(2) The effect of the latter case is that the witnesses must actually see the executants sign. It is not sufficient that they should see a hand signing and should satisfy themselves by inquiry or information that the hand is the hand of the executant. [*Casement* v. *Fuiton*(3) and *Freshfield* v. *Reed*(4) were referred to.]

De Gruyther, K.C., and *Dube*, for the respondents. The evidence establishes that the deed was duly "attested." That word only implies that the witnesses were present at the time of the execution and saw the signature made. It is not necessary that the witnesses should be able to prove the identity of the executant. If, however, identification is necessary, the two witnesses heard the executants speak and identified them by their voices. [*Parke* v. *Mears*(5) was referred to.]

Sir Erle Richards, K.C., replied.

Their Lordships intimated that they were of opinion that the deed was validly attested for reasons to be given later, and they desired to hear the appellants upon the further questions raised.

Sir Erle Richards, K.C., and *Kenworthy Brown*, for the appellants. The debt now sued for was secured by a first mortgage on Arghupur, among other villages, and the present respondents lost or gave up that security. A proportionate reduction should be

(1) (1903) I.L.R. 26 Allah. 69, at p. 71.
(2) L.R. 39 Ind. Ap. 218.
(3) (1845) 3 Moo. P.C. 395.
(4) (1842) 9 M. & W. 404.
(5) (1800) 2 Bos. & P. 217.

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made in the amount decreed as against the incumbered property in the hands of subsequent purchasers and mortgagees of the mortgagors' interest. The decree made in the 1896 suit could not have been made without the consent of the respondents, who must be taken to have abandoned their rights as against Baragaon. If a first mortgagee does not insist upon his rights and thereby prejudices the position of a subsequent mortgagee, his claim against the mortgaged property is liable to be abated. [*Jugal Kishore Sahu* v. *Kedar Nath*(1), *Ponnusami Mudaliar* v. *Srinivasa Naickan*(2), *Imam Ali* v. *Baij Nath Ram Sahu*(3), and Transfer of Property Act (IV. of 1882), s. 97, were referred to.]

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The respondents were not called upon.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. These are consolidated appeals from decrees, dated respectively March 29, 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on November 29, 1904, to enforce, by sale of the village Baragaon and other villages, the payment of Rs. 66,809 odd, due under a mortgage dated June 25, 1892. The Subordinate Judge decreed the claim in part, and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded 100 rupees the alleged mortgage was ineffective and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has

(1) (1912) I.L.R. 34 Allah. 606.
(2) (1908) I.L.R. 31 Madr. 333.
(3) (1906) I.L.R. 33 Calc. 613, at p. 621.

now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and, even if accepted as true, did not prove that the two attesting witnesses who gave evidence on the remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two pardanishin ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage deed, brought from the zenana apartments of the house in which they were to an ante-room to execute the deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a chick, which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognized the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the chick they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a tat, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage deed of June 25, 1892, was duly attested by at least two witnesses within the meaning of s. 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage deed was in fact the deed of the two pardanishin ladies, Musammat Niamat Bibi and Musammat Kamar-un-Nisa Bibi, the mortgagors.

The only other question to be considered in these appeals is the contention on behalf of the appellants that the plaintiffs in the suit have by reason of certain events, which will now be referred to, lost their right to enforce against Baragaon payment of a considerable part of the amount which they have claimed.

On August 8, 1887, Musammat Niamat Bibi and Musammat Kamar-un-Nisa, who will be hereafter referred to as the mortgagors, mortgaged the villages Arghupur and Baragaon to

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Sarju Parshad and Ramanand to secure Rs. 12,000 and interest thereon. On February 19, 1892, the mortgagors mortgaged Arghupur to Lukshmi Prasad and others to secure Rs. 30,000 and interest thereon. The mortgagees of February 19, 1892, and their representatives in title will hereafter be referred to as the second mortgagees. On June 25, 1892, the mortgagors by their deed of that date mortgaged Arghupur and Baragaon, together with three other villages, to Sarju Parshad and Ramanand to secure Rs. 32,000 and interest thereon. This sum of Rs. 32,000 included a sum of Rs. 18,000 principal and interest then due under the mortgage of August 8, 1887. On May 20, 1893, the mortgagors further mortgaged Arghupur to the second mortgagees to secure Rs. 21,324 and interest thereon. Sarju Parshad is dead; he is represented in this suit by his son, Ram Narain, who is one of the three plaintiffs. The other plaintiffs are Ramanand and his son S. Narain.

On December 14, 1896, the second mortgagees brought a suit in the Court of the Subordinate Judge of Jaunpur upon their mortgages of February 19, 1892, and May 20, 1893, to obtain a decree for the principal moneys and interest due under the said mortgages, and they prayed that, in default of payment on a date to be fixed by the Court, Arghupur should be sold by auction and the proceeds of the sale should be applied towards the satisfaction of their decree. To that suit the second mortgagees made Musammat Kamar-un-Nisa Bibi as one of the mortgagors and as the heiress of Musammat Niamat Bibi, then dead, the other mortgagor, Sarju Parshad, Ramanand, and one Indar Sen Singh, defendants. Indar Sen Singh was a subsequent mortgagee; he is a defendant to this suit, but is not an appellant. In their plaint the second mortgagees stated that Sarju Parshad, Ramanand, and Indar Sen Singh were mortgagees of Arghupur, and that they, the then plaintiffs, were ready to pay the mortgage money due to any of them who may be prior mortgagees and which they (the plaintiffs) may be legally bound to pay."

In their written statement in the suit of 1896, Sarju Parshad and Ramanand distinctly claimed their right as prior mortgagees and said, "If the plaintiffs be willing to get the hypothecated

property sold, after paying in full the prior amount due to these defendants, they have no objection whatever to the plaintiffs' claim."

The then Subordinate Judge of Jaunpur, being obviously in confusion of mind as to the rights of the parties to the suit of 1896, by his judgment of January 19, 1897, decided amongst other things that Arghupur should be sold by auction in the event of the defendants to the suit failing to pay, on or before May 19, 1897, to the plaintiffs in that suit (the second mortgagees) Rs. 49,275.9.0, the principal and interest due under the mortgage of February 19, 1892, and future interest, and that the proceeds of the sale should be applied first in payment of the amount due to the second mortgagees under their mortgage of February 19, 1892, and that the balance, if any, should be "applied in payment of the sum which may be due to Sarju Parshad and Ramanand on that date with interest. Any surplus left to be applied in payment of the sum due to the plaintiffs under the second document, dated May 20, 1893." The Subordinate Judge apparently overlooked the rights of Sarju Parshad and Ramanand under their prior mortgage of August 8, 1887. In accordance with the judgment a decree was made by the Subordinate Judge. Default having been made in payment on the date fixed, a decree absolute for sale of Arghupur was made by the Subordinate Judge of Jaunpur on September 4, 1897. Under the decree of September 4, 1897, Arghupur was sold. The proceeds of the sale were applied first in payment to the second mortgagees of the sum then due to them in respect of their mortgage of February 19, 1892, and the balance of the proceeds of the sale was paid to the first mortgagees; that balance did not satisfy the amount then due to the first mortgagees under their mortgage of August 8, 1887. If the proceeds of the sale of Arghupur had been first applied to the payment of the amount then due under the mortgage of August 8, 1887, that mortgage would have been satisfied, and the amount due under the mortgage of June 25, 1892, would have been to that extent reduced. As the proceeds of the sale of Arghupur did not satisfy the amount due to the second mortgagees under their mortgage of May 20, 1893, they obtained a decree under s. 90 of the Transfer of Property Act, 1882, and in execution of

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this decree the village of Baragaon was sold on April 20, 1904, and was purchased by the appellants.

On behalf of the appellants it has been contended before this Board and in the Courts below that Baragaon was relieved of all liability in respect of the debt due under the mortgage of August 8, 1887, by reason of the failure of Sarju Parshad and Ramanand to insist on their priority under that mortgage, it being alleged in support of the contention that Sarju Parshad and Ramanand had agreed to waive their priority as mortgagees of Arghupur, or had waived it, of which, if it were material, there is no proof, and that they were guilty of laches in not insisting on that priority. Their Lordships have found it difficult to follow the argument in support of the contention, as the appellants had no interest in Baragaon until they purchased Baragaon on April 20, 1904, and what they then purchased was the interest of the mortgagors in that village.

It is true that had Sarju Parshad and Ramanand appealed against the decree of the Subordinate Judge, they could have had their interests as first mortgagees under the mortgage of August 8, 1887, protected, and would, on the sale of Arghupur, have obtained payment of the amount then due under that mortgage. Sarju Parshad and Ramanand did not, by an appeal, insist on their right as prior mortgagees, but the fact that they did not insist on having the amount due under the mortgage of August 8, 1887, satisfied in priority to the claim of the second mortgagees does not disentitle the plaintiffs to recover the full amount of their claim in this suit, and does not entitle the appellants to relief. No other fact which would entitle the appellants to relief has been shown. The appeals fail.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

Solicitor for appellants: *Douglas Grant.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

RAJWANT PRASAD PANDE AND OTHERS . APPELLANTS;

AND

RAM RATAN GIR AND OTHERS . . . . RESPONDENTS.

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June 7, 8.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Res judicata—Mortgage Decree Absolute—Objection to Jurisdiction—Dismissal of Objections—Subsequent Suit to set aside—Code of Civil Procedure (*V. of* 1908), *s.* 11.

Upon an application to make absolute a mortgage decree against the appellants and another, the appellants objected that the decree had not been properly made against them as it was the result of a retrial at the instance of their co-defendant upon which retrial they had not been allowed to appear, and that they were still bound by the original decree in the suit. The Subordinate Judge dismissed this objection and made a decree absolute for sale; upon the appellants' appeal the High Court affirmed that decision. The appellants afterwards instituted the present suit claiming a declaration that the mortgage decree and the decree absolute were not binding upon them:—

Held, that, without proof of fraud, the appellants could not maintain the suit, the matter being res judicata.

APPEAL from a judgment and decree of the High Court (February 23, 1911) reversing a judgment and decree of the Additional Subordinate Judge of Gorakhpur (August 17, 1909).

In February, 1909, the appellants and one Prag Dat, since deceased, instituted the suit against the first respondent, claiming a declaration that they were not parties to a decree made against them and the second respondent on September 22, 1902, that their names had been entered therein without jurisdiction, and that they were not bound by the decree. Alternatively they alleged that their names had been included in the decree by the fraud of the defendant. They asked that the decree be rectified by the exclusion of their names.

The defendant (first respondent) denied the fraud alleged, and pleaded that the suit was barred as res judicata under the Code of Civil Procedure, 1908, s. 11. The facts are fully stated in the judgment of their Lordships.

No evidence of fraud was given at the trial.

The High Court (Sir John Stanley C.J. and Banerji J.),

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reversing the decision of the trial judge, dismissed the suit, holding that the appellants were estopped by the mortgage decree absolute, which was subsequently confirmed upon their appeal to the High Court.

Lowndes, for the appellants.(1) The appellants were liable under the original mortgage decree and were not parties to the retrial; their names were included in the judgment by mistake. The appellants' proper course was to apply for a review under s. 263 of the Civil Procedure Code, 1882. They are not, however, precluded from maintaining the present suit: *Pran Nath Roy* v. *Mohesh Chandra Moitra.*(2) [Code of Civil Procedure, 1882, s. 244, was also referred to.]

De Gruyther, K.C., and *Dube*, for the first respondent. The appellants' objections upon the application to make absolute the mortgage decree of September 22, 1902, and their subsequent appeal raised the same points as they now rely upon. They are precluded by s. 11 of the Code of Civil Procedure, 1908, from maintaining the suit: *Ram Kirpal Shukul* v. *Rup Kuari*(3); *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa.*(4) The circumstances of the case are similar to those in *Haji Ashfaq Husain* v. *Laia Gauri Sahai.*(5)

Lowndes replied.

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June 8.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a decree of February 23, 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated August 17, 1909, of the Court of the Additional Subordinate Judge of Gorakhpur. The Court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be threefold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the

(1) The arguments upon the questions other than that of res judicata, upon which their Lordships' judgment alone proceeded, are not reported.

(2) (1897) I.L.R. 24 Calc. 546.
(3) (1883) L.R. 11 Ind. Ap. 37.
(4) (1900) L.R. 27 Ind. Ap. 216.
(5) (1911) L.R. 38 Ind. Ap. 27.

defendants to the effect that the plaintiffs are no party to a certain order which was made against them on September 22, 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a Court of competent jurisdiction on September 22, 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor in title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage, and directed against, inter alios, these three persons, was instituted. It was heard ex parte, and on April 30, 1897, a decree was made allowing the plaintiffs' claim. An order absolute was made on September 22, 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant issues made in the course of these litigations), Bhagwant and his two sons obtained an order under s. 108 of the Code of Civil Procedure, 1882, to have the decree of April 30, 1897, set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The Court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and the other had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The Courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application Rajwant had no right of appearing. Their Lordships are of

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opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On September 22, 1902, the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April, 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family, and this decree was affirmed by the High Court on July 19, 1905. The situation that thus arose was that in September, 1902, a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April, 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on June 23, 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902, but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made: "In the beginning the name of Bhagwant Prasad also is entered as a defendant, but on his application this decree was set aside as against him, and consequently his name was not entered in the column of judgment debtors. Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September, 1902, absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on July 7, 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on November 3, 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in

their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on November 3, 1906, the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propose in support of the present appeal to this Board. The grounds of judgment of the High Court delivered on February 26, 1908, make it clear beyond all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as res judicata; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated seriatim. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was res judicata, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer made is that the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the Court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the application in the High Court of the doctrine of

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merger, either in a general sense or in the sense of a vox signata. The decree of February 26, 1908, sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the Court; it had jurisdiction to entertain them.

It is said that the Court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa*(1) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King-Emperor who was a party to the proceedings, still, upon a new application to Courts of justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent Court. That rescission and destruction could be obtained on the ground of fraud "practised on the Courts below"; but fraud has been eliminated from this case. Accordingly these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellants: *Douglas Grant.*

Solicitors for first respondent: *Barrow, Rogers & Nevill.*

(1) L. R. 27 Ind. Ap. 216.

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MUNSHI LAL AND OTHERS . . . . . APPELLANTS; *June* 8, 9; *July* 13.

AND

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[AND CONNECTED APPEALS.]

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Inheritance—Mitakshara—Uncle of Half-blood—Son of Uncle of Whole Blood.

Under the Mitakshara law a paternal uncle of the half-blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood.

The preference given to the whole blood over the half-blood is confined to sapindas of the same degrees of descent from the common ancestor.

CONSOLIDATED APPEALS from judgments and decrees of the High Court (April 9, 1910, and April 13, 1911) reversing judgments and decrees of the Subordinate Judge of Farrakhabad.

The consolidated appeals related to property which formed part of the estate of Bahadur Singh, deceased, and the main issue raised was whether under the Mitakshara law of succession his heirs were the sons of his father's own brother deceased (those claimants being represented in the appeal by the parties Munshi Lal and others), or whether his father's half-brother (represented in the appeal by Kesri and others) was entitled to succeed. The property in suit was a third share in two villages which were in the possession of Ganga Sahai, he having purchased the villages at an auction sale held under a mortgage decree made in favour of himself and others as mortgagees, and having obtained certificates undre s. 317 of the Code of Civil Procedure, 1882. The mortgagee interest under the mortgage in question was at the date of the decree and sale vested as to a one-third share in the heirs of Bahadur Singh.

* *Present*: LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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In 1906 the two sets of claimants above referred to each instituted a suit against Ganga Sahai, joining their rival claimants as parties with him, and each claiming, as heirs of Bahadur Singh, to recover the third share in the two villages to which the latter had been entitled.

Both Courts in India held that Ganga Sahai was not by reason of his purchase at the auction sale entitled as against the heirs of Bahadur Singh, and those claiming under them, to the entire possession of the two villages.

Upon the question as to who was entitled under the Mitakshara law to succeed to Bahadur Singh the Subordinate Judge decided in favour of the claimants represented in the appeals by Munshi Lal and others, holding that the sons of a father's own brother were to be preferred to a father's half-brother.

A Full Bench of the High Court, consisting of Sir George Knox, Banerji, and Richards JJ., by its judgment delivered on April 9, 1910, reversed this decision. Banerji J., with whose opinion his learned colleagues concurred, in the course of his judgment said: "In ch. 2, s. 5, of the Mitakshara, the rule of succession in default of brothers' sons is laid down, the heirs being gotraja sapindas and after them bhinna gotra sapindas or bandhus. Among the former the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons (s. 5, v. 4). The word in the original Sanskrit which has been translated as 'successively' is kramena, which means one after another. Among gotraja sapindas, therefore, the paternal grandmother takes first; after her, the paternal grandfather; after him uncles, that is, the paternal grandfather's sons; and, in default of them, their sons. The son of the paternal uncle thus comes in after the paternal uncle, whether he is of the whole blood or the half-blood. As we have seen, a brother of the half-blood excludes the son of a brother of the whole blood. On the same principle, which is that of propinquity, a paternal uncle of the half-blood excludes the son of a paternal uncle of the whole blood. The learned advocate for the respondents contends that s. 5, v. 4, is intended to apply only to relations of the whole blood, but there is no authority as far as we are aware in support of this contention, and none has been cited. On the contrary,

the Madana Parijata by Visvesvara Bhatta, a commentary on the Mitakshara of great authority, clearly explains what the meaning of the rule is. The passage in the Madana Parijata bearing on the point is thus translated by Professor Sarvadhikari in the Tagore Law Lectures for 1880, p. 440: 'Among the paternal uncles, the succession of uterine and half-blood uncles should be regulated in the same manner as in the case of brothers, that is, the paternal grandmother's sons first inherit and after them the step-grandmother's sons, and in their default the paternal uncle's sons inherit in the same manner as brothers' sons. The same passage is quoted in Mandlik's Hindu Law, p. 384, footnote, and is similarly translated. Reading the text of the Mitakshara by the light of this commentary, there can be no room for doubt that an uncle of the half-blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter."

The proceedings in the High Court are reported I.L.R. 32 Allah. 541 and I.L.R. 33 Allah. 563.

Lowndes, for Ganga Sahai. The evidence shows that the properties in suit were purchased by Ganga Sahai for his own benefit; the heirs of Bahadur Singh, whoever they may be, have no right to share in them. The claims of the respective groups of plaintiffs are matters which should have been dealt with in execution proceedings under s. 244 of the Code of Civil Procedure (XIV. of 1882). Ganga Sahai obtained a certificate under s. 317 of that Code confirming his purchase, and the plaintiffs are precluded by that section from maintaining the suits.

[Their Lordships did not call upon the other parties with regard to Ganga Sahai's claim in the appeal.]

Ross, K.C., and *Kenworthy Brown*, for Munshi Lal and others. The position of uncles in the scheme of inheritance according to the Mitakshara is provided for by ch. II, s. 5, v. 4. The Mitakshara by ch. II, s. 3, makes exceptions in favour of brothers and nephews of the half-blood, but these exceptions should not be extended. There is no provision in the Mitakshara giving a right to uncles of the half-blood, and the son of an uncle of the whole blood is therefore entitled to inherit before an uncle of

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the half-blood. The High Court decided chiefly upon the authority of the Madana Parijata of Visvesvara Bhatta, which the judgment refers to as a commentary upon the Mitakshara. That work is not a commentary upon the Mitakshara upon which the present question has to be decided, although the Subodhini by the same author is so: Sarvadhikari's Hindu Law, p. 411; Colebrooke's Preface to Stokes' Hindu Law Books, p. 177. The principles of inheritance under the Mitakshara differ from those of the Dayabhaga in depending upon community of corporeal particles, and not upon the offering of funeral oblations: [*Suba Singh* v. *Sarfaraz Kunwar*(1); *Nathiappa Gounden* v. *Kishen Sahai*(2); *Vithalrao* v. *Ramrao*(3); *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*(4); Mitakshara, ch. II., s. 4, vv. 5, 6, 7 and 8; and Vyavahara Mayukha, ch. IV., s. 8 (16), were also referred to.] Manu, ch. IX., vv. 212 and 217, and the Shastras make it clear that in early times only relations of the whole blood were entitled to inherit.

De Gruyther, K.C., and *Dube*, for Kesri and others. By the Mitakshara, ch. II., s. 4, vv. 6, 7, 8, it is clear that a brother of the half-blood excludes the son of a brother of the whole blood. On the same principle, which is that of propinquity, a paternal uncle of the half-blood excludes the son of a paternal uncle of the whole blood. The Mitakshara is not exhaustive; having laid down the principle as between brothers and nephews it is not expressly laid down again. The word "successively" in s. 5, v. 4, impliedly introduces the principle as to each class of relation named. The Madana Parijata is recognized as of high authority on questions of inheritance. The decisions referred to by the appellants do not support their contentions. [Mayne's Hindu Law, 7th ed., pp. 774, 775, and 777, was referred to.]

Ross, K.C., replied.

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July 13.

The judgment of their Lordships was delivered by

MR. AMEER ALI. These several consolidated appeals from certain decrees and judgments of the High Court of Allahabad

(1) (1896) I.L.R. 19 Allah. 215.
(2) (1915) 28 Madr. L.J. 1.
(3) (1899) I.L.R. 24 Bomb. 317.
(4) (1914) L.R. 41 Ind. Ap. 190, at p. 199.

arise out of three suits brought in the Court of the Subordinate Judge of Farrakhabad. The plaintiffs in two of these suits, claiming adversely to each other to be the heirs of one Bahadur Singh, deceased, sought to recover from the appellant Ganga Sahai a one-third share of the properties specified in their respective plaints which he had purchased at a sale held in execution of a decree upon a mortgage to which reference will be made presently. The third suit was brought by Kalka Pershad, one of the plaintiffs in the above suits, to recover from the respondent Chunni Lal certain shares in mauza Malkapur belonging to the estate of Bahadur Singh which had been conveyed to him by one Gulab Koer, Bahadur's stepmother.

Their Lordships propose to deal first with the two suits in which Ganga Sahai was the defendant.

The mortgage bond referred to above was executed so long ago as the year 1869 by one Jai Chand Chowdhry, in favour of Bahadur Singh and Debi Din, the ancestor of Ganga Sahai, hypothecating two villages named respectively Tahsipur and Bilaspur. One-third of the amount advanced on this transaction admittedly belonged to Bahadur Singh, and the other two-thirds to Debi Din. On default of payment by Jai Chand, a suit was brought in 1891 by Bahadur Singh in conjunction with Bhima Singh and Ganga Sahai, the heirs and representatives of Debi Din (who had died in the meantime). Bahadur Singh died during the pendency of the suit, and his widow, Lachman Koer, was brought on the record in his place. On November 21, 1891, the usual mortgage decree under s. 88 of the Transfer of Property Act (IV. of 1882) was made by the Court. This was followed on April 27, 1893, by the final decree under s. 89 of the Act.

It appears from the record that Lachman Koer died in 1894. On December 20, 1897, Ganga Sahai applied for execution of the mortgage decree against the heir and representative of the mortgagor. In his application he expressly reserves the rights of Lachman Koer's heirs. The passage in question is important in view of the contention now raised by him. He states: "Bhaman Singh, another decree-holder, has died a natural death. His sons, Mauji Ram and Raj Kunwar, are his heirs; but they do not join in the application, hence, under s. 231 of the

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Code of Civil Procedure, this decree-holder alone makes this application, and prays that the decree may be executed subject to the rights of the heirs of Musammat Lachhman Kunwar and Bhaman Singh." Bhaman Singh is evidently the same person as Bhima Singh.

The mortgaged properties were accordingly put up to sale on February 20, 1899, and purchased by Ganga Sahai. The sale appears to have been duly confirmed, and two sale certificates were issued to him in respect of Tahsipur and Bilaspur respectively, and he is admittedly now in possession of the properties.

The two sets of plaintiffs, as already stated, claim to be the heirs of Bahadur Singh adversely to each other; but as against the appellant Ganga Sahai they seek identical relief. They say that the purchase by Ganga Sahai of the properties in question was not exclusively for himself, but for the benefit of the heirs and representatives of both mortgagees. The Courts in India have upheld their contention. Ganga Sahai has appealed to this Board and takes his stand on the first clause of s. 317 of the Civil Procedure Code of 1882, which was in force when the sale took place. That clause provides as follows: "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase. An example of this will be found in the case of *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*(1), decided by this Board in 1873.

The Courts in India were perfectly right in refusing to allow Ganga Sahai to perpetrate a fraud against his co-decree-holders under cover of this section. His application for execution was under s. 231 of the Code, and it was made subject to their rights. Had he not even embodied this reservation in his petition, the Court executing the decree would have of its own motion protected

(1) (1873) 12 Beng. L.R. 317.

the interests of the other decree-holders. Their Lordships agree with the Courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one-third share of the properties purchased by him in execution of the joint mortgage decree.

The question then arises who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Rajaram, his uncle by the half-blood, was alive; and he claimed the properties in preference to Kalka Pershad and Jian Lal, the sons of a full paternal uncle named Gunga Pershad. Rajaram has since died and is now represented by his sons and grandsons who are plaintiffs in one of the suits and respondents before this Board. Jian Lal has also died, and his son, Munshi Lal, now stands in his place. Kalka Pershad and Munshi Lal were the plaintiffs in the second suit, and they claimed in opposition to Rajaram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood.

As the question of heirship was involved in all the three suits they appear to have been tried together; and the Court of first instance held in favour of Jian Lal and Kalka Pershad mainly on the authority of a decision of the Allahabad High Court, which it considered had settled the rule of succession in favour of the heirs related by the whole blood. The District Judge affirmed this decree. On appeal, however, to the High Court, the learned judges explained that in their judgment in *Suba Singh* v. *Sarfaraz Kunwar*(1), on which the lower Courts had relied, they had laid down no such principle as had been inferred; what they meant to decide was simply this, that under the Mitakshara the distinction of whole blood was not confined to the brother and his sons, but extends further. And on an examination of the doctrines of the Mitakshara, they held in effect that this preference of the whole blood to the half-blood applied to sapindas of the same degree of descent from the common ancestor, and did not apply to persons of different degrees. They were accordingly of opinion that Rajaram being paternal uncle of the half-blood was entitled preferentially to the

(1) I.L.R. 19 Allah. 215.

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inheritance of Bahadur Singh to the exclusion of his cousins, although they were the sons of an uncle of the whole blood. They accordingly dismissed the claim of Munshi Lal and Kalka Pershad in their suit against Ganga Sahai and others, as also the claim of Kalka Pershad in his suit against Chunni Lal. They at the same time decreed the claim of Rajaram's representatives against Ganga Sahai. Munshi Lal and the representatives of Kalka Pershad, who died during the pendency of the suit, have appealed to His Majesty in Council from these decrees of the High Court dismissing their claim; and the main contention advanced on their behalf is that, although the Mitakshara expressly provides for the succession of the half-brother in preference to nephews of the whole blood, there is no such provision in respect of uncles; and further that as it provides for the succession of the grandmother on failure of the father and his descendants, it must follow that by the words "the uncles and their sons" Vijnaneswara meant that uncles of the whole blood and their sons should succeed in preference to the issue of another wife of the paternal grandfather. This argument, in their Lordships' opinion, would apply with equal force to the case of half-brothers and the sons of brothers of the whole blood. But it is conceded that the author of the Mitakshara has expressly declared that brothers of the half-blood come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the propositus and the brothers of his father. Having regard to the general scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half-blood is confined to members of the same class, or, to use the language of the judges of the High Court in *Suba Singh* v. *Sarfaraz Kunwar*(1), to "sapindas of the same degrees of descent from the common ancestor," and that, therefore, on the death of Lachman Koer, Rajaram as uncle of the half-blood became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result all the appeals will be dismissed. Kesri and the respondents joined with him will have all their costs from the

(1) I.L.R. 19 Allah. 215.

appellant Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for Ganga Sahai: *T. L. Wilson & Co.*
Solicitors for Kesri and others: *Barrows, Rogers & Nevill.*
Solicitors for Munshi Lal and others: *Douglas Grant.*

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MERWANJI MUNCHERJI CAMA & ANOTHER APPELLANTS;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } RESPONDENT.

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Estoppel—Tenure of Land—Quit Rent and Sanadi Lands—Certificated Extract from Rent Rolls—Bombay City Land Revenue Act, 1876 (*Bombay Act II. of* 1876).

The object of the Bombay City Land Revenue Act, 1876, is to make provision for the administration and collection of revenue and not to establish a system of registration of titles.

A certificate given by the Collector, under the provisions of the above Act, certifying a purported extract from the rent rolls kept thereunder, which extract incorrectly referred to certain land as being under the head "Rent roll of quit and ground rent," does not estop the Government from treating the land as held under sanadi tenure.

APPEAL from a judgment and decree of the High Court (March 25, 1912) affirming a judgment and decree of Beaman J. (July 15, 1911).

The appellants instituted the suit in the High Court claiming a declaration against the respondent that certain land in the city of Bombay was of quit and ground rent tenure, and that the respondent had no right to resume possession under a sanad, and for consequential relief. The appellants by their plaint alleged that they had been induced to advance money upon mortgage of the land in question upon the faith of, inter alia,

* *Present*: VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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certified extracts from the rent roll kept under the Bombay City Land Revenue Act, 1876, which extract described the land as of quit and ground rent tenure.

The material facts appear from the judgment of their Lordships.

The suit was tried by Beaman J. and dismissed. The learned judge held upon the facts that there was no representation made to the appellants, and that if there were it was not intended to be acted on.

The High Court in its appellate jurisdiction (Scott C.J. and Russell J.) affirmed this decision.

The learned judges, differing from the view of Beaman J., held that the respondent would not be estopped by acts or omissions of the Collector, amounting to negligent misrepresentations in breach of his statutory duty, and that the evidence did not establish that there had been any such misrepresentation or breach of duty on the Collector's part.

P. O. Lawrence, K.C., E. B. Raikes, and *Lowndes,* for the appellants. The law of estoppel in India as laid down by the Indian Evidence Act, 1872, s. 115, is the same as under English law: *Sarat Chunder Dey* v. *Gopal Chunder Laha.*(1) Under the Act of 1876 the Government was bound to have a separate register or rent roll in respect of quit rent and of sanadi holdings. The duty under the Act is to grant certificates, and the rule requiring members of the public themselves to make the extracts is ultra vires. The certificated extracts were representations to every person who upon their faith had dealings in the land. The evidence shows that the appellants relied and acted upon the statements contained in the extracts, and the respondent is consequently estopped: *Coventry, Sheppard & Co.* v. *Great Eastern Ry. Co.*(2) The acts of the Collector in pursuance of the Act were done on behalf of the Government and the respondent is bound by them. [Indian Evidence Act, ss. 74, 76 and 77, were also referred to.]

Sir Erle Richards, K.C., and *Dunne,* for the respondent, were not called upon.

(1) (1892) L.R. 19 Ind. Ap. 203, at p. 208. (2) (1883) 11 Q.B.D. 776.

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June 29.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The facts in this case are really not in controversy. The appellants have advanced on mortgage of land in the city of Bombay Rs. 80,000. They claim against the respondent, the Secretary of State, that they advanced this sum to Abdul Hussein Ibrahimji, the mortgagor, relying on statements in certified extracts from the rent roll of quit and ground rent land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of sanadi tenure. The question to be decided is whether the appellants, who were plaintiffs in the Courts below, are entitled to a declaration that the respondent is estopped from treating the land as of sanadi tenure. In Bombay both of these tenures exist. The land in question is in fact held under a sanad which purports to enable the Government to resume possession for public purposes on giving six months' notice and providing compensation for buildings and other improvements. For the purposes of the question to be decided their Lordships assume, although the point is not conceded, that if the land were held on the other tenure it would be contrary to the practice of the Government, if not to the law, to resume possession, and that the land would be in consequence more valuable as a security. It is not, however, clear that such a view has always prevailed or that the difference between the two tenures was regarded as important at the time of the mortgage.

The sanad was granted by the Government of Bombay in 1824, a rent of 11 reas per square yard being reserved. Such a rent would have been the usual rent had the land been of the other tenure.

In January, 1892, the mortgagor had granted a security over the land for an advance from the Chartered Mercantile Bank. A Mr. Gostling, partner in the firm of Gostling & Morris, land surveyors in Bombay, had been employed to report on the security and the title. He inspected certain entries in the Collector's rent rolls and in what was called Laughton's Revenue Survey Register, both of which were kept in the office of the Collector. In the entries which he inspected there were express references to the sanad with which the title originated. He

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applied to the Collector for "certified extracts" from the rolls and register. These extracts were, in accordance with the rules which obtained, made by his own clerk, and were formally certified by an assistant of the Collector as correct. The extracts were, however, inaccurate in certain points. In one of them the title given was "Rent roll of quit and ground rent," instead of, as it should have been in accordance with the book from which it was taken, "Rent roll of land situate in New Town or Camatipura." In another of the extracts, the entry in the rent roll from which it was taken contained a reference to the sanad of 1824, and this was omitted in the extract. Mr. Gostling, in addition, obtained from the mortgagor a notice in which the Collector required payment of a small sum as rent for "the quit and ground rent land situate at New Town." He also inspected the title deeds. These did not go back as far as the sanad of 1824, but on one of them, dated in 1843, there was an indorsement to the effect that the registration of deeds of transfer did not imply any relinquishment of the right of ownership in, or the power to resume, the land at the pleasure of the Government, but that the sole object of the register was to enable the Collector to apply to the proper person for the payment of the rent.

Mr. Gostling does not appear to have been deterred by this indorsement, or by the references to a sanad, from recommending the title. Their Lordships think that in 1892, when he made the investigation, importance was not attached in the same degree as later on to the difference between the two tenures. It appears to have been thought that in neither case was there substantial likelihood of the Government resuming the land.

On October 25, 1892, some ten months after the first advance, the mortgagor obtained advances on second mortgage from the appellants. The latter employed a solicitor named Shroff to investigate the title and advise as to the security. His evidence shows that he inspected the title deeds at the bank and also got hold of the certified copies of the extracts from the Collector's rent rolls and the Collector's notice to which reference has been made. He appears to have applied to the Collector for

access to certain of the records and to have obtained it. At all events he searched the records, which not only did not indicate that the tenure was quit and ground rent, but which contained a reference to the sanad of 1824. It is probable that he was not paying more attention to the difference between quit rent and sanadi tenure than had Gostling or the Collector's clerk who checked the extracts made by Gostling's clerk. In the end he advised the appellants to proceed with the mortgage.

The case made for the appellants, who were plaintiffs at the trial, was that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector has estopped the respondent, the Secretary of State, from denying that the land is of quit rent as distinguished from sanadi tenure, and that the appellants are entitled to a declaration of title on that footing. In order to determine whether this is so it is necessary to ascertain what was the duty of the Collector and his position in relation to the Government and the public. The Collector, prior to 1876, kept in his office what were called rent rolls of land, on whatever tenure held. After 1876 this practice continued, but was regulated by the Bombay Act II. of that year, known as the Bombay City Land Revenue Act, 1876.

Under this Act, which extends only to the city of Bombay, the controlling authority in all matters connected with the land revenue is vested in the Collector of Bombay, subject to the Governor in Council. The duty imposed on him is to fix and levy the assessment for land revenue. The liability is to be settled with the superior holder of the lands, subject to an appeal to the Revenue Judge, who is to be the senior magistrate of police. There is a further appeal to the High Court on its appellate side. The existing survey and the demarcation of lands already made, and all the records of this survey, are to be prima facie evidence. Corrections of such demarcation or of entries in the records of the survey may be made by the Collector, or by order of a competent Court.

Part VIII. of the Act relates to transfer of lands. Sect. 30 provides that whenever the title to immovable property subject

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to the payment of land revenue to the Government is transferred, the transferor and transferee are to give notice to the Collector. Any transferor who fails to give notice is, in addition to being liable for a penalty, to continue liable for the payment of land revenue until notice is given or transfer is effected in the Collector's records. In case of dispute as to the making or completion of any entry or transfer, the Collector may summon the parties and take evidence and decide summarily what entry should be made. Sect. 35 provides that the registration or transfer of any title in the Collector's records shall not be deemed to operate so as in any way to affect any right, title, or interest of the Government in the property in respect of which such transfer is made or registered. In the final part of the Act, which is headed "Miscellaneous," it is provided that it shall be the duty of the Collector to prepare and keep, in such form as the Government shall from time to time sanction, a separate register and rent roll of every description of land, according to the nature and terms of the tenure on which such land is held. All maps, registers, and other records are to be kept in the office, and to be open to the inspection of the public, who are to be entitled to obtain extracts or certified copies.

Their Lordships are of opinion that the Act must be treated as defining the extent of the rights of any one who consults the maps, register, and records at the office, and that in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. When it is so read their Lordships think that this purpose and the nature of the rights conferred are not doubtful. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to

relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

From this conclusion as to the scope of the Act it follows that what has taken place in the present case has not given the appellants any right to claim that the Government is prejudiced in any right it has to treat the land in question as of sanadi as distinguished from quit rent tenure. Nor are their Lordships satisfied that at the time of the investigation of the title in 1892 the parties themselves really attached much importance to the statements as to tenure in the extracts and other documents produced. They appear to have inspected the deeds in the usual fashion, and to have concerned themselves with the question of who was the owner of the land rather than with the question of the rights of the Government. In the view which has been taken, it is not necessary to deal separately with the question raised under s. 35 of the Act as to whether any right, title, or interest of the Government could be affected by the registered entry.

Their Lordships will humbly advise His Majesty that the appeal fails and ought to be dismissed with costs.

Solicitors for appellants: *E. F. Turner & Sons.*

Solicitor for respondent: *The Solicitor, India Office.*

J. C.* 1915 — *June* 16, 17, 18; *July* 13.

THAKURANI TARA KUMARI . . . . APPELLANT;

AND

CHATURBHUJ NARAYAN SINGH & OTHERS RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Joint Family—Impartible Estate—Succession—Separation—Right of Widow.

The holder of an impartible estate of a joint Hindu family, descending by primogeniture subject to the making of maintenance grants to younger sons, made a mokurari grant to his younger brother for maintenance. The grantee built a separate house, divided from his brother's by a wall, established therein a tulsi pinda and thakurbari, and lived there separately from his brother. He defrayed the marriage expenses of his daughter subsequently to the grant:—

Held, upon the facts, that there had been a complete separation between the brothers, and that the impartible estate consequently became separate property in which the appellant, the widow of the last holder, was entitled to a widow's estate.

CONSOLIDATED APPEALS from a judgment and two decrees of the High Court (January 7, 1910) reversing a judgment and two decrees of the Additional Subordinate Judge of Monghyr (January 22, 1909).

The chief question for determination in the appeals was whether the appellants (plaintiffs) had established that a separation took place between them and the respondents' respective predecessors in interest, two brothers members of a joint Hindu family governed by the Mitakshara school of Hindu law, so as to bar the title of the respondents to the property in suit. The property was an ancestral impartible estate the succession to which was governed by the rule of primogeniture subject to the right of the younger sons to receive maintenance. In 1879 Ranjit Narayan Singh, the then holder, executed in favour of his brother Bhupat Narayan Singh a mokurari patta of two mauzas and of four bighas of kamat land in another mauza as a grant for his maintenance. By the terms of the mokurari patta the

* *Present*: VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, SIR JOHN EDGE, and MR. AMEER ALI.

grant was inalienable, but the grantee did in fact execute mortgages from time to time to raise money for his needs. After this grant Bhupat Narayan, under circumstances which appear from the judgment of their Lordships, separated himself from his brother in food and worship. Ranjit Narayan Singh was succeeded in the gaddi by his son, who died in 1903 leaving a widow, the appellant Thakurani Tara Kumari. She and the respondent Chaturbhuj Narayan Singh, the son of Bhupat, both applied to be registered as owner of the estate, the application of the latter being granted and the decision confirmed by the Revenue Courts.

The appellant Tara Kumari sold a half-share in the estate to Maharajah Sir Raveneswar Pershad Singh, the appellant in the second appeal, for Rs. 50,000, of which Rs. 47,699 were applied by the purchaser, under the terms of the sale, to the discharge of mortgages upon the estate.

In August, 1907, the appellant instituted the present suits against the respondents, Chaturbhuj and his sons. In each of the suits the claim was substantially for a declaration that the appellant Tara Kumari had succeeded to the estate upon the decease of her husband and that the respondent Chaturbhuj had no title. The Maharajah in his plaint prayed in the alternative for relief on the basis of having discharged the mortgages above referred to.

The Additional Subordinate Judge, by his judgment delivered on January 22, 1909, decreed both suits. He held that although the mokurari grant alone did not effect a separation, the other facts taken in conjunction with that grant constituted a complete separation between the brothers.

The High Court (Brett and Sharfuddin JJ.), by its judgment delivered on January 7, 1910, reversed this decision. The learned judges while accepting all the facts as found by the Subordinate Judge disagreed with his conclusions thereon; they held that a complete separation between the brothers had not been established, and that, therefore, the estate must follow the ordinary line of inheritance to joint property under the Mitakshara law subject to the rule of primogeniture. The suits were accordingly dismissed.

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Sir R. Finlay, K.C., and *Lowndes*, for the appellants. The facts establish that there was a complete separation between the brothers. Although the maintenance grant by itself did not constitute a separation, the whole facts taken together do so. The property consequently was separate property of the first appellant's husband, and she is entitled to a widow's estate therein. If it was decided in *Laliteshwar Singh* v. *Rameshwar Singh*(1) as a general proposition that no separation is possible in the case of an impartible estate, that decision is erroneous.

[*De Gruyther, K.C.* The respondent does not rely upon that decision as being applicable to the present appeal.]

The authorities clearly establish that a joint Hindu family can be divided so as to affect the succession to an impartible estate. [Mitakshara, ch. II., s. 12, v. 1, and Mayne's Hindu Law, 7th ed., pars. 495 and 671, were referred to.]

De Gruyther, K.C., and *Dunne*, for the respondents. An ancestral estate, although impartible, is not the separate property of any single member of the family so long as the family remains joint: *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(2); *Rajah Rup Singh* v. *Rani Baisni.*(3) To establish a separation with regard to an impartible estate so as to bar the right to succeed, it must be shown that there was an intention to abandon that right: *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari.*(4) [Mayne's Hindu Law, 7th ed., pars. 495, 671, 731 and 732 were also referred to.] All the incidents relied on as showing a separation followed as a natural result from the maintenance grant, and showed no intention to abandon the right to succeed by survivorship.

Sir R. Finlay, K.C., in reply. There need not be an express abandonment of the right to succeed; such evidence as would ordinarily establish a separation is sufficient to bar the right to succeed. The case reported L.R. 2 Ind. Ap. 263 is distinguishable as there was in that case a partition of a definite portion of the joint property. [*Tekait Durga Prasad Singh* v. *Tekaiti*

(1) (1909) I. L.R 36 Calc. 481.
(2) (1870) 13 Moo. Ind. Ap. 333.
(3) (1884) L. R. 11 Ind. Ap. 149.
(4) (1875) L.R. 2 Ind. Ap. 263.

Durga Koeri(1) ; *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*(2) ; *Kali Krishna Sarkar* v. *Raghunath Deb*(3) ; *Katama Nachiar* v. *Rajah of Shivagunga*(4) ; and *Bejai Bahadur Singh* v. *Bhupindar Bahadur Singh*(5) were referred to.]

The judgment of their Lordships was delivered by

SIR JOHN EDGE. These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on August 19, 1907, in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneswar Pershad Singh was a pro forma defendant. The other appeal, in which Maharajah Sir Ravaneswar Pershad Singh is the appellant, has arisen in a suit which was brought by him on August 19, 1907, in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were pro forma defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram Narain Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairo Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immovable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Gadi, in the district of Monghyr. Taluka Telwa is an ancestral impartible estate which, in his lifetime, was held

(1) (1873) 20 Suth. W. R. 155.
(2) (1890) I.L.R. 18 Calc. 151.
(3) (1903) I. L. R. 31 Calc. 224.
(4) (1863) 9 Moo. Ind. Ap. 539.
(5) (1895) L. R. 22 Ind. Ap. 139, at p. 150.

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as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh, and before him by his father Thakur Bhairo Narayan Singh. By the kulachar or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on September 14, 1879, granted to his brother Bhupat Narayan Singh a mokurari patta (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family. Except in so far as the family custom applies, the law of the Mitakshara governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharajah. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharajah in his suit claimed possession of the other moiety of Taluka Telwa as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharajah is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharajah's suit Chaturbhuj Narayan Singh alleged: "4. That the said family is governed by the Benares school of Hindu law save and except that according to family custom the said ancestral zamindari descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said zamindari. The junior members, even after khorposh or maintenance grants are made to them out of the joint property,

are entitled to obtain the expenses of marriage, sradh and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

"5. That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the mokurari settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said mokurari deed for the terms thereof. This defendant wholly denies that either before or after the said mokurari settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time separate in food, worship or estate from the said Ranjit Narayan Singh or that he lived in a house separately built. This defendant asserts that he and his father the said Bhupat Narayan Singh during his lifetime were joint in food, worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food, worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter with the defendant No. 6, until shortly before the commencement of the registration proceedings, when disputes and disagreements arose. The allegations to the contrary in paragraph 3 of the plaint are wholly false.

"6. That assuming, though by no means admitting, that Bhupat Narayan Singh and this defendant became separate from Thakur Ranjit Singh in the year 1287 F. S. and since then he and this defendant were separate in mess and business and lived in a separate house, as has been falsely alleged in the plaint, this defendant submits that nevertheless the impartible estate Taluka Telwa continued to remain joint family property as before, as it never was nor could be the subject of partition, and the defendant No. 1 therefore became solely entitled to it under the family custom on the death of Thakur Ram Narayan Singh, in preference to his widow."

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The "defendant No. 1" mentioned in the written statement is Chaturbhuj Narayan Singh, and the "defendant No. 6" is the Thakurani, who, as has been already stated, was a pro forma defendant in the suit of the Maharajah. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of Taluka Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(1) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh* v. *Maharani Janki Koer*(2) this Board held that "There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Shivagunga Case*(3), and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females." Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house about a tussi (120 feet) to the westward of the family house, established a tulsi pinda there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh. As

(1) (1869) 12 Moo. Ind. Ap. 523. (2) (1902) L. R. 29 Ind. Ap. 178.
(3) 9 Moo. Ind. Ap. 539.

a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate thakurbari in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the mokurari patta to Bhupat Narayan Singh. Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689.2.6 for the expenses of that marriage, and on June 27, 1897, gave to Shir Lal Modi and Amir Modi a mortgage of lands which he held under the mokurari patta to secure the repayment to them of, amongst other moneys, that sum of Rs. 689.2.6, which was stated in the mortgage deed to have been borrowed by him from them "for performing the marriage of my own granddaughter, i.e., the daughter of my son, Baba Chaturbhuj Narayan Singh."

On April 27, 1905, Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned judges of the High Court it is better to give

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the following extracts from their joint judgment. They say:—

"It is the case common to both sides that Bhupat Narayan was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narayan and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narayan executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narayan built himself a new house outside the old family dwelling and that in course of time a thakurbari and a tulsi pinda were established in that house and that a wall of separation between his house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant Bhupat Narayan raised money by mortgages on the property leased to him and spent it on the marriage of members of his family and on their maintenance. Still are not all these acts such as might have been expected on the part of a member of the family who had received a grant for his maintenance? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narayan from the time of the grant and of a separation in fact from that time?

"It has not been contended before us, nor indeed could the contention be accepted as a sound one, that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant.

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant Ranjit Narayan and Bhupat separated and ceased to be members of a joint Hindu family. We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned pleader and counsel which have been advanced before us, and even though we accept the findings of the Subordinate Judge we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact."

"The facts that after the grant of the mokurari lease for main-

tenance Bhupat Narayan lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food, and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned judges of the High Court that those judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned judges overlooked the fact that Bhupat Narayan Singh and his son had no co-parcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah, and as there was valid necessity for that sale she conveyed a good title to the Maharajah.

Their Lordships will humbly advise His Majesty that these

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consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs, and the decrees of the Subordinate Judge should be restored.

The respondents, Chaturbhuj Narayan Singh and his four minor sons, must pay the costs of the appeals.

Solicitors for appellants: *Downer & Johnson.*

Solicitors for respondents: *T. L. Wilson & Co.*

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June 11, 14, 15, 16; *July* 13.

BILAS KUNWAR . . . . . APPELLANT;

AND

DESRAJ RANJIT SINGH AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Landlord and Tenant—Estoppel—Tenant holding over—Indian Evidence Act (I. of 1872), s. 116—Benami Transaction.

The Indian Evidence Act (I. of 1872), s. 116, provides: "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; . . . .":—

Held, that the estoppel applies in the case of a tenant who is holding over after notice to quit.

Held, further, upon the facts, that a purchase of property by a Hindu in the name of his Mahomedan mistress was a benami transaction.

APPEAL from a judgment and decree of the High Court (May 10, 1910) reversing a judgment and decree of the acting Subordinate Judge of Allahabad (August 26, 1908).

The suit was instituted by Balraj Kunwar, since deceased, the widow of a taluqdar of Oudh, against the respondents to recover possession of a bungalow. The facts are stated in the judgment of their Lordships. Two questions arose upon the appeal, namely, (1.) whether the purchase of the property in suit by the taluqdar in the name of his Mahomedan mistress, from whom the first respondent purported to have bought, was benami,

* *Present:* VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

and (2.) whether the first respondent was estopped from denying the appellant's title by s. 116 of the Indian Evidence Act, 1872. After the suit was instituted the plaintiff Balraj Kunwar died, and the above-named appellant, her co-widow, was brought upon the record in her place.

The acting Subordinate Judge who tried the suit gave judgment for the plaintiff. He was of opinion that the respondents were estopped from denying the appellant's title, and that the question as to the true ownership of the property could only be tried in a separate suit after the respondents had delivered up possession.

The High Court (Richards and Tudball JJ.) reversed this decision. The learned judges found upon the facts that the property had been purchased by the taluqdar with the intention of conferring the beneficial ownership upon his mistress. They further held that no estoppel arose in favour of the substituted plaintiff, the appellant, as she was not the original landlord or her heir or representative.

Sir Erle Richards, K.C., and *Ross, K.C.*, for the appellant. The facts show that the purchase by the taluqdar was a benami transaction. The view of the High Court upon the estoppel question was clearly erroneous, as the landlord was the plaintiff in the suit. The subsequent substitution of the present appellant upon the record is immaterial. Sect. 116 of the Indian Evidence Act, 1872, is intended to reproduce the English law with regard to the estoppel of a tenant. The English authorities establish that the estoppel applies when a tenant holds over after notice to quit: Smith's Leading Cases, 11th ed. vol. ii., p. 183; *Doe* v. *Smythe*(1); *Bayley* v. *Bradley*(2); *Doe* v. *Baytup.*(3) Under the Transfer of Property Act, 1882, s. 108 (*q*), a tenant is bound to put the lessor into possession of the property at the end of the tenancy.

De Gruyther, K.C., and *Dube*, for the respondents. Upon the facts the intention of the taluqdar was to confer a beneficial interest upon his mistress. [*Uman Pershad* v. *Gandharp Singh*(4) was referred to.] The first respondent by purchase from her

(1) (1815) 4 M. & S. 347.
(2) (1848) 5 C.B. 396, at p. 400.
(3) (1835) 3 Ad. & E. 188.
(4) (1887) L.R. 14 Ind. Ap. 127.

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obtained a good title. The estoppel does not arise, because the tenancy was verbal, and upon the facts it was made on behalf of the mistress and not on behalf of the plaintiff as landlord.

Sir Erle Richards, K.C., replied.

The judgment of their Lordships was delivered by

SIR GEORGE FARWELL. This is an appeal from a judgment and decree dated May 10, 1910, of the High Court at Allahabad, which reversed a judgment and decree dated August 26, 1908, of the judge of the Small Causes Court of Allahabad exercising the powers of a subordinate judge.

Rai Bisheshar Bakhsh Singh was a taluqdar of Oudh; he was a man of some wealth, a Rajput of good position; he had two Rajput wives, but no son; he had, however, one daughter by one of the wives. He had also a Mahomedan mistress named Jagmar Bibi, by whom he had two sons, and for whom he had made provision on a fairly liberal scale, and had given full possession thereof in 1876 and in 1888. On June 9, 1887, the taluqdar purchased for Rs. 9,000 the bungalow in dispute in this action; he raised the purchase-money by a mortgage on his own property and paid for it, and had the sole use and enjoyment of it for himself and his wives during his own life, but the deed of sale was made out and registered in Jagmar's name. The taluqdar spent money on the house, built a well and walls, and kept a gardener in occupation, he and his wives lived there, and the mother of one of his wives lived and died there. His wives used the bungalow by his permission for kalabbas—i.e., to live at the bank of the Ganges for religious purposes for a month at a time; the purchase seems to have been made for the purpose of the kalabbas. Jagmar Bibi was never in the bungalow during this period; she would, of course, as a Mahomedan mistress, have no part or lot in the Hindu religious observances of Rajput wives, and it is inconceivable that she could have associated in any way in the bungalow with them.

The bungalow was useless to her for any personal use, and it was wholly inappropriate as a provision for her if the taluqdar ever had any intention or idea of making a further provision for her; the net income was very small—in some years the out-

goings exceeded the income. There is no evidence of any intention to give the bungalow to Jagmar as a provision for her or otherwise beyond the bare fact of the registration in her name; it is not clear how or when she got possession of the title deed; it may be that it was in the taluqdar's possession at his death, and was obtained by her at some subsequent period. As the deed was made out in her name there is no importance in this. Down to the taluqdar's death the natural inference is that the purchase was a benami transaction, a dealing common to Hindus and Mahomedans alike, and much in use in India. It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India: *Gopeekrist* v. *Gungapersaud*(1); but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Mussumat Shama Soondari Dibiah*(2): "The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid."

On August 31, 1890, the taluqdar died, and by an agreement of March 21, 1894, between his two widows the possession and management on behalf of both was given to one of them, namely, Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the taluqdar could affect the nature of the benami transaction as it stood at his death it is unnecessary to consider, for their Lordships are of opinion that nothing has been given in evidence which could have any effect at all on the transactions as benami. The evidence given by Jagmar is quite untrustworthy, and she has not even called her sons whom she purports to vouch as actors on her behalf: the

(1) (1854) 6 Moo. Ind. Ap. 53. (2) (1843) 3 Moo. Ind. Ap. 229.

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trial judge does not place any confidence in Roshan Lal's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes, and repairs and the ground rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave possession in 1890, and to whom also she gave notice to quit on October 13, 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout benami. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the taluqdar of such a property as this bungalow in the name of his Mahomedan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the taluqdar to benefit his mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to the plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is of course possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books if produced would have shown rent credited to Jagmar or set off against some claim against her.

They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to the defendant Ranjit Singh; he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Sect. 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and counsel for the respondents have not attempted to support their judgment on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the trial judge be restored, and that the respondents should pay all the costs here and below.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitors for respondents: *Ranken Ford, Ford & Chester.*

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BUDDHA SINGH AND OTHERS . . . . . APPELLANTS;

AND

LALTU SINGH AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Inheritance—Mitakshara—Collaterals—Great-Grandson of Grandfather—Grandson of Great-Grandfather—Putra.

In the Mitakshara, as expounded in the Benares school, the word "putra," used in connection with brothers and uncles, in ch. II., s. 5, must be understood in a generic sense, as in the case of lineal descendants of the deceased, and the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree before making the ascent to the line next in order of succession.

Consequently, under Mitakshara, ch. II., s. 5, vv. 4 and 5, the great-grandson of the grandfather of a deceased person is entitled to inherit in preference to the grandson of the great-grandfather.

Further, while under the Mitakshara the right of inheritance arises from sapinda-relationship, of community of blood, in judging of the nearness of blood-relationship, or propinquity, among the gotrajas, the test to be applied is the capacity to offer funeral oblations.

APPEAL from a judgment and decree of the High Court (July 6, 1912) affirming a judgment and decree of the Subordinate Judge of Moradabad (June 23, 1910).

The appellants instituted a suit against the respondents for the possession of movable and immovable property, the last owner of which was one Saheb Sahai, deceased.

The sole question to be determined in the appeal was whether, according to the Mitakshara law of the Benares school, the first appellant, who was the grandson of the great-grandfather of Saheb Sahai, had a preferential right of inheritance as against the first respondent, the great-grandson of the grandfather of the propositus. A genealogical table will be found in their Lordships' judgment.

The Subordinate Judge of Moradabad dismissed the suit, being of opinion that the propinquity which extends down to the great-grandson in the case of lineal inheritance extends in a similar

* *Present*: LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

manner to three degrees from each ancestor in the case of collaterals.

The High Court (Sir P. C. Banerji J. and Piggott J.) affirmed the decree of the Subordinate Judge.

The former learned judge, after setting out the text of Yajnavalkya, reproduced in the Mitakshara, ch. II., s. 1, v. 1, and the text of the Mitakshara, ch. II., s. 5, vv. 4 and 5, said: "The question thus turns on the interpretation of the words 'santana' and 'putra' in vv. 4 and 5 of the Mitakshara cited above, that is to say whether by 'santana' in vv. 4 and 5 is meant the descendants specifically mentioned in the preceding verses, and the word 'putra' is to be taken in the narrow sense of 'son' and does not include 'grandson.' The appellants contend that the enumeration of heirs given in the above paragraphs should be strictly followed, and that after the paternal uncle comes the line of the paternal great-grandfather. They say that the paternal uncle's grandson is a gotraja only under the last portion of v. 5. It may be taken as settled that the enumeration of heirs in the Mitakshara is not exhaustive. We have, therefore, to consider whether the word 'son' is to be understood in the narrow sense contended for, and whether in the case of each ancestor in the ascending line only two descendants are to be computed. The word 'putra' has, it seems to me, been understood in a wide sense. In the text of Yajnavalkya beginning with 'patni' (wife), &c., cited above, the word at the end is 'aputrasya.' That the word 'putra' is used by him in an extended sense and is not limited to the son, but also includes the son's son and the son's grandson, is manifest. This is admitted by Mr. Mandlik on page 222 of his work on Hindu Law. In the translation of the text itself he has retained the word 'putra,' and in the note relating to it he says 'the word "putra" in this verse stands for son, son's son, son's son's son'. He refers to the Viramitrodaya and Balam Bhatta as authorities for this interpretation. This is also in accordance with what Manu ordains (ch. IX., v. 187, Sacred Books of the East, vol. 25, p. 366) in the following text: 'To three ancestors water must be offered; to three funeral cakes must be given; the fourth descendant is the giver of oblations; the fifth has no connection.' So that the participation of the

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body extends to the fourth descendant, including the 'propositus'. To the same effect is the following text of Devala: 'Up to the third degree the members of the family are of the same body.' (Ghose's Hindu Law, 2nd ed., p. 97.) Parasara says that 'the separation of the body accrues to the fifth person born of one's family'. (Ghose, p. 57.) Jimutavahana, quoting Manu, Vishnu, Harita, Yajnavalkya, Sankha and Likhita, says that 'the term "putra" stands for descendants up to the son's son's son.' (Mandlik's Hindu Law, p. 381.) Vijnaneswara, the author of the Mitakshara, has also used the word 'putra' in the same sense.

"In ch. I., s. 1, v. 3, treating of unobstructed and obstructed inheritance, he says with reference to sons and grandsons, &c., that the rule should be 'inferred in respect of "their" sons.' Both Balam Bhatta and the author of the Subodhini are of opinion that the word 'their' (tai) in the above passage refers to the grandson, &c., so that the grandson includes the great-grandson. Again ch. II., s. 1, of the Mitakshara is headed 'Right of the widow to inherit the estate of one who leaves no "putra" (aputrasya).' There can be no doubt that the word 'putra' here also includes the grandson and the great-grandson. Similarly, in s. 4 of the same chapter, the word seems to have an extended meaning; so that the author of the Mitakshara has generally used the word 'putra', wherever it occurs, in the sense of including the two immediate descendants of the son in the direct line. There is apparently no reason for holding that he has used the same word in a restricted sense in s. 5, vv. 4 and 5. It seems that having used the word 'putra' in other places in an extended sense, he considered it unnecessary to state that he used it in the same sense in the chapter in question also."

Th learned judge further came to the conclusion that the preponderance of opinion of modern commentators and of judicial authority was in favour of the respondents, but that the view of Mr. Harrington, extending the line to six descendants, went too far. He concluded his judgment by saying: "Upon a true interpretation of the text of the Mitakshara and on the authorities referred to above, I hold that the three immediate descendants of the grandfather succeed in preference to the great-grandfather

and his descendants, and that the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather."

Piggott J. delivered a separate judgment also holding that the appeal should be dismissed. While not coming to a definite conclusion as to whether the line of each ascendant was to be exhausted to the sixth person in male descent, or whether only to three descendants, the learned judge held that either of those schemes was preferable to that which would follow the line of each ascendant for two generations only before passing to the next ascendant's line.

The proceedings in the High Court are reported I.L.R. 34 Allah. 663.

De Gruyther, K.C., and *Dunne*, for the appellants. In ch. II., s. 5, v. 4, of the Mitakshara, which lays down the position of the descendants of the grandfather, the expression "uncles and their sons" does not include the grandsons of uncles. Upon default of uncles and sons of uncles the inheritance passes under s. 5, v. 5, to the line of the great-grandfather. From each ascendant in order two descendants only are to be exhausted before passing to the ancestor further removed. The Madras High Court rightly so held in *Suraya Bhukta* v. *Lakshminarasamma*(1) and in *Chinnasami Pillai* v. *Kunju Pillai.*(2) The view taken by the Allahabad High Court in *Kalian Rai* v. *Ram Chandar*(3) and in the present case is erroneous. The Bombay decisions in *Rachava* v. *Kalingapa*(4) and *Kashibai* v. *Moreshvar Raghunath*(5) do not affect the present question as they turned upon the rights of widows. Sanskrit employs distinct words for son, grandson, and great-grandson (putra, pautra, and prapautra); there is therefore no reason to suppose that Vijnaneswara uses "putra" as meaning both sons and grandsons. None of the Sanskrit commentators upon the Mitakshara say trat "putra" as there used includes grandsons. The Subodhini of Visvesvara Bhatta expressly limits inheritance to two descendants of a

(1) (1881) I.L.R. 5 Madr. 291.
(2) (1911) I.L.R. 35 Madr. 152.
(3) (1901) I.L.R. 24 Allah. 128.
(4) (1892) I.L.R. 16 Bomb. 716.
(5) (1911) I.L.R. 35 Bomb. 389.

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brother (see passage cited in the first Madras case already referred to). The high authority of the Subodhini as a commentary is referred to in Vyavashta Chandrika, vol. 1, introd., p. 17; Morley's Digest, introd., p. 205; Jolly's Hindu Law, p. 14. The appellants' contention is supported by the Viramitrodaya, ch. III., pt. 7, s. 4, the authority of which in the Benares school is high: *Gridhari Lall Roy* v. *Bengal Government.*(1) No inference as to the meaning of "putra" in the Mitakshara can be drawn from the use of "aputrasya" in ch. II., s. 1, v. 2, since the latter word has the technical meaning of "issueless" apart from its use in the Mitakshara. The respondents' contention is inconsistent with the position expressly assigned by s. 5, vv. 1 and 2, to the grandmother, namely, immediately after the brother's sons. Mr. Harrington's view, as stated in *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae*(2), that six descendants are to be exhausted before passing to the next ascendant, is erroneous: West and Bühler, 3rd ed., p. 124. [The following were also referred to: *Lulloobhoy Bappoobhoy* v. *Cassibai*(3) (for translation of s. 5 approved by the Board); *Kureem Chand Gurain* v. *Oodung Gurain*(4); *Oorhya Kooer* v. *Rajoo Nye Sookool*(5); *Bhyah Ram Singh* v. *Bhyah Ugur Singh*(6); *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*(7); Mayne, 7th ed., § 573; and Mandlik, pp. 360 and 380 to 385.]

Sir R. Finlay, K.C., and *Dube*, for the respondents. In the Mitakshara, ch. II., s. 5, v. 4, the word "sons" includes "grandsons." The descendants of each lineal ancestor are to be brought in down to the great-grandson. It is indisputable that in the case of lineal descendants of the propositus the right of inheritance extends to the great-grandson, although by ch. I., s. 1, v. 3, only sons and grandsons are named, and although Yajnavalkya, in the passage repeated in the Mitakshara, ch. II., s. 1, v. 2, uses the word "aputrasya." [Manu, ch. IX., vv. 186,

(1) (1868) 12 Moo. Ind. Ap. 448, at p. 466.
(2) (1839) 2 Moo. Ind. Ap. 132.
(3) (1880) L.R. 7 Ind. Ap. 212, at p. 235.
(4) (1866) 6 Suth. W.R. 158.
(5) (1870) 14 Suth. W.R. 208.
(6) (1870) 13 Moo. Ind. Ap. 373.
(7) (1914) L.R. 41 Ind. Ap. 290.

187, was referred to.] The propinquity which in the case of lineal descent extends to the great-grandson equally does so in the case of collaterals. The word "putra" throughout the Mitakshara is to be interpreted in accordance with this principle. The weight of judicial authority is strongly in favour of the respondents. The Madras cases were decided upon the Mitakshara as interpreted in that Presidency.

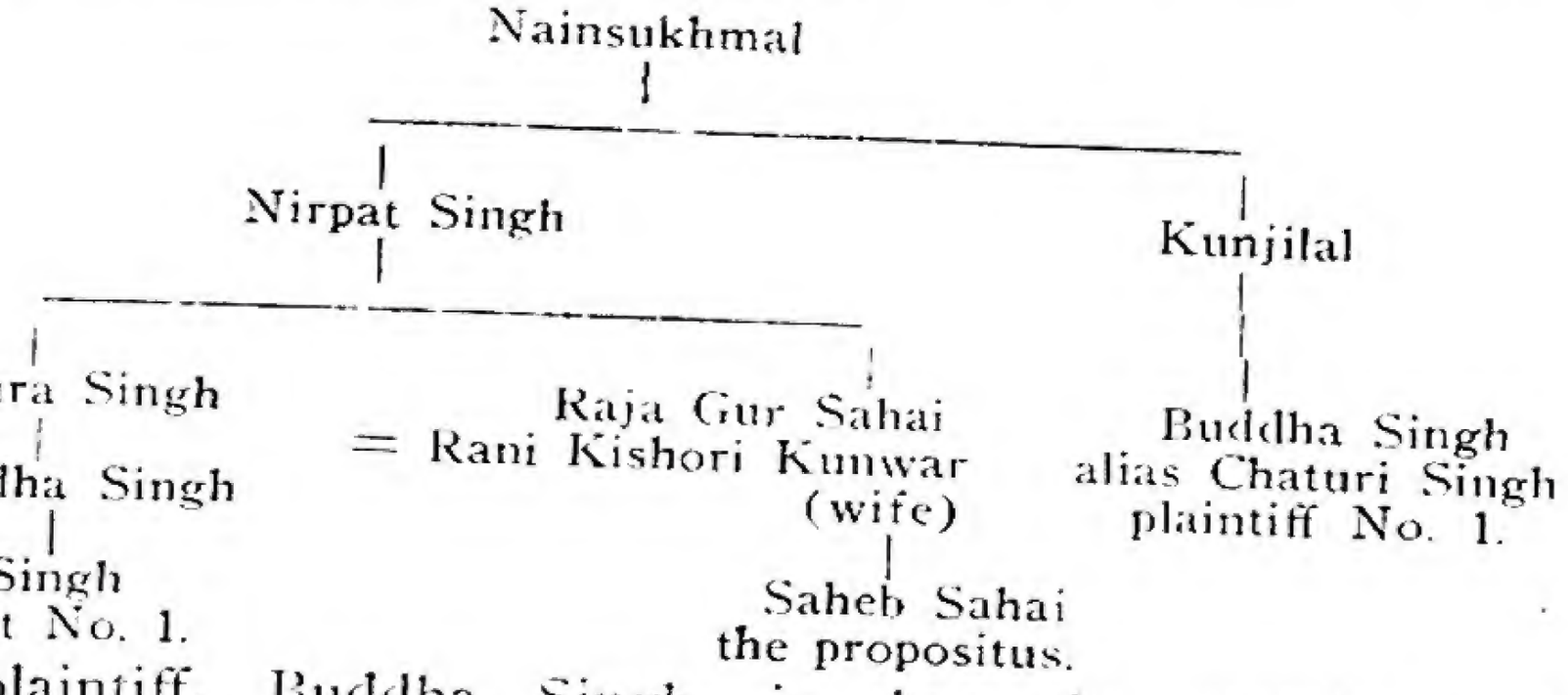
[They were stopped by their Lordships.]

The judgment (1) of their Lordships was delivered by

MR. AMEER ALI. The question for determination involved in this appeal is one of considerable importance under the Hindu law, and relates to the order of succession under the Mitakshara, as expounded in the Benares school, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the appeal arises was brought by the appellant Buddha Singh, alias Chaturi Singh, to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873 without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly thirty-four years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai.

The following genealogical table, on which both the Courts in India have based their judgments, will explain the relative position of the parties to this action:—



The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grandfather of Saheb Sahai, whilst the

(1) The footnotes appear in their Lordships' judgment as published.

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defendant Laltu is the great-grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the Mitakshara he has a preferential title to the inheritance of Saheb Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the Mitakshara:—"On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."(1) And he contends that the expression "sons" occurring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the defendant Laltu, and that after Buddha, by virtue of the immediately following verse, he, as the grandson of the great-grandfather of the deceased, has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the Courts in India have held against the plaintiff's claim; hence this appeal to His Majesty in Council.

The learned judges of the Allahabad High Court in two separate and able judgments have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on those deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The Mitakshara of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a commentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions, and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on the rule

(1) Colebrooke's translation, ch. II., s. 5, v. 4.

relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus: "The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes."(1)

Mr. Mandlik's rendering of these two slokas of Yajnavalkya is more literal, and is as follows: "The wife, daughters, both parents, brothers and likewise their sons, gotrajas (gentiles); bandhus (cognates); a pupil and a fellow student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven, leaving no putra. This rule extends to all (males whether belonging or not to the four) classes."(2)

The compound word aputra, occurring in Yajnavalkya's text, has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no putra." He was evidently anxious to avoid any English synonym, as the word putra here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The Viramitrodaya says clearly that the word "sonless", which is the literal equivalent of aputra, signifies "in default of son, grandson, and great-grandson"(3), that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word putra as used in relation to the last owner signifies and includes son, grandson, and great-grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

(1) Colebrooke's translation of the Mitakshara, ch. II., s. 1, v. 2.
(2) Mandlik's translation of the Institutes of Yajnavalkya, p. 220, vv. 135, 136.
(3) Chap. III., Part I., v. 2, Sastri Golapchandra Sarkar's translation, p. 154.

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The commentary of Vijnaneswara on the above-quoted slokas of Yajnavalkya extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In ch. II., s. 1, the author deals exhaustively with the right of the widow to inherit the estate of "one who has died aputra." "Her right of succession is dependent on his leaving no male issue to the third degree. In v. 3 the word putra is used again in the same generic sense. After treating of the rights of daughters and parents in ss. 2 and 3 respectively, he deals in s. 4 with the succession of brothers and "their sons." Here, again, the word putra is used, whether in the literal or in an extended sense is a matter for consideration.

Sect. 5 relates to the right of collateral kindred of the same paternal stock or gotra, and therefore called the gotraja, to take the inheritance of the aputra in default of "brother's sons." Admittedly both the plaintiff and the defendant are Saheb Sahai's gotrajas. Reference, therefore, is necessary to the rules embodied in s. 5.

It is to be noted here that the word putra, or more correctly put-tra, which literally means "one who releases from hell (put)," is used by Vijnaneswara at the very beginning of his book on Inheritance. In ch. I., s. 1, v. 3, describing the two kinds of property (daya, wealth) to which rights of inheritance attach, namely, the "unobstructed" and "obstructed," he speaks thus of the latter class: "but property devolves on parents (or uncles) and brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing the property devolves [on the successor] in right of his being uncle or brother. This is an inheritance subject to obstruction." And then comes the significant passage, "The same holds good in respect of their sons and other descendants," meaning, clearly, the sons and descendants of uncles and brothers. And this is the construction which Balam Bhatta, one of the best known commentators of the Mitakshara, appears to have put on these words.

As pointed out in the case of *Ramchandra Martand* v. *Vinayak*

Venkatesh(1), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest sapinda. The right of collaterals, therefore, is dependent on the existence of the sapinda-relationship between the propositus and the claimant. It is now well settled by the decisions of this Board (*Lulloobhoy Bappoobhoy* v. *Cassibai*(2) and *Ramchandra's Case*(1) above referred to) that under the Mitakshara the sapinda-relationship arises "between two people through their being connected by particles of one body," namely, that of the common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of "community in the offering of religious oblations." But, as will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of s. 5, erroneously rendered the word sapinda as "relations connected by funeral oblations," and samanodakas as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lulloobhoy's Case*.(2)

The first paragraph stands thus: "If there be no brother's sons, gotrajas share the estate. Gotrajas are the paternal grandmother and sapindas and samanodakas."

Their Lordships understand that the word rendered "sons" in this paragraph is putra in the original. Then follows v. 2, in which Vijnaneswara develops the position of the grandmother in the following terms: "In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. 'And the mother also being dead, the father's mother shall take the heritage' (s. 1, v. 7). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall

(1) L.R. 41 Ind. Ap. 290. (2) L.R. 7 Ind. Ap. 212.

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take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course, succeed immediately after the nephew; and thus there is no contradiction."

Verse 3 then states in general terms that after the grandmother the sapindas of the same paternal stock, namely, "the paternal grandfather and the rest inherit the estate, for bhinnagotra sapindas (i.e., sapindas belonging to another stock) are indicated by the term bandhu" (dealt with in s. 6).

Verses 4 and 5 deal specifically with the succession of the samanagotra sapindas and run as follows: "(4.)Here on failure of the father's *descendants*, the heirs are successively the paternal grandmother, the paternal grandfather, and their sons. (5.)On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their *issue*, inherit. In this manner must be understood the succession of the samanagotra sapindas." It is clear from the observations of both Mr. Mandlik(1) and Dr. Jolly(2) that Mr. Colebrooke in his translation of verse 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage. Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh [sapinda] the taking of wealth by the samanagotra sapindas should be known." Only instead of the expression samanagotra, which is in the original, he uses the abbreviated term sagotra.

Verse 6 then provides as follows: "If there be none such, the succession devolves on samanodakas, and they must be understood to reach the seven degrees beyond sapindas, or else as far as the limit of knowledge and name extends. Accordingly Vhrat Manu says: 'The relation of the sapindas ceases with the seventh person, and that of samanodakas extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by gotra."

It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunc-

(1) Mandlik's Hindu Law, p. 379.
(2) Dr. Jolly's Tagore Law Lectures, p. 124.

tion with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease ipso facto on the failure of descendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, namely, in what sense Vijnaneswara has used the the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and secondly by inquiring in what sense other Hindu jurists of the same school or cognate schools have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the gotraja, on the authority of an enunciation of Manu, which he quotes in ch. II., s. 1, v. 7, and which runs thus: "Of a son dying childless the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognizes; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as West and Bühler also indicate, after the "brother's sons." The question, however, whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

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Now, in s. 5, v. 1, where Vijnaneswara says, "if there be not even brother's sons," the word used is putra; in v. 2, where the grandmother's place is declared, the expression employed is brother's suta, a synonym of putra. In v. 4 again the word putra appears to be used in connection with uncles. In v. 5, where the expression "his sons and their issue" occurs, the original words are said to be tat putras, "his sons," and tat sunavas(1), "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "santana," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Telang J. in *Rachava* v. *Kalingapa*(2) construes it as meaning "continuation"; other learned Sanskritists interpret it to signify "an uninterrupted series" (of progeny or heirs). Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. Sunavas, translated by Mr. Colebrooke as "issue," connotes the same idea.

Having regard to the fact that this great legist (Vijnaneswara), whose logical acumen judging from his work seems to have been remarkable, has used the term putra in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as atmaja or auras, which, their Lordships understand, mean "son of one's loins."(3) Nor can their Lordships appreciate the argument that the meaning of such words as santana and sunavas, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's

(1) Plural of sunu "offspring." Sunu is the old Indo-Aryan word which survives in the English "son."

(2) I.L.R. 16 Bomb. 716.

(3) See Mandlik, p. 380; and Sutherland's translation of the Dattaka Mimansa (Stoke's Hindu Law Books, p. 547).

contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation: "To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection with them."(1) The other is deduced by Mr. Harrington(2), the well-known author of the Analysis, and one of the most erudite judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in s. 5, v. 6, where he declares that the succession of the samanagotra sapindas extends "in this manner" to "the seventh degree." It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well founded, as the High Court has considered it to be, it would be sufficient to dispose of this appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the word putra-pautra ("son-grandson"), used by Vijnaneswara in ch. I., s. 1, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the Viramitrodaya shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of the text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text, on which the author of the Mitakshara has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the

(1) Sacred Books of the East, vol. XXV., v. 186, p. 36.

(2) See *Rutcheputty Dutt Iha* v. *Rujunder Narain Rae*, 2 Moo. Ind. Ap. 132, at p. 158.

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Benares school is clear from the fact, to which Mr. Mandlik refers, that Visvesvara Bhatta, the author of the Subodhini, a commentary on the Mitakshara, has used Apararka's work among others for the compilation of his Madanaparijata. Parts of Apararka's treatise and of the Madanaparijata have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880.

Nanda Pandita, "an esteemed writer of the Benares school," and the author of the noted work on the law of adoption called the Dattaka Mimansa, a standard treatise among the followers of the Mitakshara, has written commentaries both on the Mitakshara as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the Vaijayanti, in giving the order among the sagotras, he states that "in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term putra to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares school, has given expression to the same view. Vidyabhusan Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the Vyavastha Chandrika.

This learned Hindu writer states in principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureem Chand Gurain* v. *Oodung Gurain*(1) without taking any exception to its correctness. In the note to the principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words: "Because the term brother's son is inclusive also of the brother's grandson, and because he is

(1) 6 Suth. W.R. 158.

sapinda and the nearest of the persons understood by the term gotraja." The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote: "It may be asked that when in law the term 'son' (put-tra) is inclusive of the grandson and great-grandson, why then the term 'brother's son' does not include also the 'brother's great-grandson'?" The answer which he gives to his own question is both interesting and instructive. "The answer is," he says, "that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term 'son' (of that ancestor) is inclusive of his great-grandson, who is the brother's grandson."

Dr. Rajkumar Sarvadhikari, whose authority as an expounder of the Hindu law has been recognized by the Calcutta High Court and this Board, in his Tagore Law Lectures gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the Smriti Chandrika, whose doctrines, however, are not recognized in Northern India, holds the contrary opinion; and Visvesvara Bhatta in the Subodhini certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the Madana Parijata. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Apararka, admittedly differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the Smriti Chandrika can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the Mitakshara. The Subodhini stands on a different footing; it no doubt professes to be a commentary on the Mitakshara, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Visvesvara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chunder Shastri, both of whom take their stand on the literal construction of the word putra. This thesis has been elaborately worked out by the former writer, but

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in substance it amounts to this, that as Vijnaneswara has used the expression "son" in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Rajkumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest sapindas), inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous sapinda-relationship before the next in order can take; so that the parents and "their three successive descendants" take first; then the paternal grandmother and the paternal grandfather, and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute(1), and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of the Sacred Books of the East, are in substantial agreement with Dr. Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the Smriti Chandrika and the Subodhini, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application, and deserves, therefore, careful attention.

(1) Dr. Bhattacharyya, M.A., Hindu Law, p. 444; Mr. Ghose, D.L., in his Commentaries on the Hindu Law, p. 119.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewanny Adalut of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheputty Dutt Iha* v. *Rujunder Narain Rae*(1) as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of bandhus or cognates under the Mitakshara to the succession to a deceased person in the presence of a gotraja. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word putra, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His judgment was affirmed on appeal to this Board; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh.*(2) Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gurain* v. *Oodung Gurain*(3) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word putra was accepted; and it was held that in the scheme of the Mitakshara the term "brother's son" includes brother's grandson.

In *Kalian Rai* v. *Ram Chandar*(4) the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned judges of the Allahabad High Court (Burkett and Chamier JJ.) came to the conclusion that under the law of the Mitakshara, as accepted and expounded in the Benares school, the brother's grandson had the right of succession to the deceased before it ascended to the second line, namely, the grand-parental line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the Mitakshara are recognized subject to the interpretation of the Vyvahara

(1) 2 Moo. Ind.Ap. 132.
(2) 13 Moo. Ind.Ap. 373.
(3) 6 Suth.W.R. 158.
(4) I.L.R. 24 Allah. 128.

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Mayukha of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtara schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Telang J., a Sanskritist of high order, in *Rachava* v. *Kalingapa*(1), explains thus the order of descent among the gotrajas (enunciated in ch. II., s. 5, vv. 4 and 5, of the Mitakshara), although, as he points out, each ascending line begins with a female (gotraja) ancestress: "In the Mitakshara, ch. II., s. 5, pl. 4—5, it is laid down that the propinquity of gotrajas is to be determined by lines of descent—that is to say, the inheritance is to go first in the line" (the word in the original, "santana" literally "continuation") "of the paternal grandfather, then in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth. . . . ."

The Madras High Court in two cases, named respectively *Suraya Bhukta* v. *Lakshminarasamma*(2) and *Chinnasami Pillai* v. *Kunji Pillai*(3), has held, as already stated, the direct opposite. The ratio decidendi in both judgments, which are elaborate and closely reasoned, is of a twofold character; in the first place the learned judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visvesvara Bhatta, in the Smriti Chandrika and Subodhini respectively, as conclusively showing that the Mitakshara must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the Subodhini. Curiously enough there is no reference in either of the Madras judgments referred to above to a previous decision of the same Court in *Parasara Bhattar* v. *Rangaraja Bhattar*(4), to which

(1) I.L.R. 16 Bomb. 716.
(2) I.L.R. 5 Madr. 291.
(3) I.L.R. 35 Madr. 152.
(4) (1878) I.L.R. 2 Madr. 202.

Turner C.J. was also a party. In that case the rule of the Smriti Chandrika was not accepted nor was the literal construction of the Mitakshara followed. It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one judge.

In *Suraya Bhukta's Case*(1) the judges say they had "consulted their learned colleague, Muttusami Ayyar J.," and acknowledged their obligations to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. The recorded opinion of Muttusami Ayyar J. would have been of great value had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the Mitakshara, as expounded in the Benares school, the word putra and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the manes of the common ancestor. Now, it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the Viramitrodaya(2), an authoritative

(1) I.L.R. 5 Madr. 291.

(2) Golapchandra Sastri's translation, p. 91, ch. II., pt. I., s. 23A.

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commentary on the Mitakshara, lays down this doctrine in express terms. He says, "when there are many claimants to the heritage among gotrajas and the like(1), then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits." Dr. Raj Comar Sarvadhikari renders the last part of this passage thus: "The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance."(2)

In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh*(3) the Board affirmed this rule in the following words: "When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *Ranken Ford, Ford & Chester.*

Solicitors for respondents: *Pyke, Parrott & Co.*

(1) Dr. Sarvadhikari construes the word "like" as meaning "other classes of heirs."

(2) Tagore Law Lectures for 1880, p. 629.

(3) 13 Moo. Ind. Ap. 373.

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AND

BAI RAJBAI . . . . . RESPONDENT.

[AND CONSOLIDATED CROSS-APPEALS.]

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Land Tenure—Kasbatis—Rights in Ceded Territory—Pattas—Leasehold Interest—Bombay Act VI. of 1862—*Bombay Act VI. of* 1888.

After a cession of territory previously under native rule the only enforceable rights in respect of the land ceded are those subsequently conferred by the Crown by express or implied agreement, or by legislation. An agreement to confer rights which existed before the cession may be implied from evidence that the Crown recognized those rights and expressly or impliedly elected to be bound by them.

Bombay Act VI. of 1862 does not apply to kasbatis and Bombay Act VI. of 1888 does not confer upon a kasbati holding under a patta in the nature of a lease any greater rights than those conferred by the terms of the patta.

The respondent's ancestor had been kasbati of a village in pargana Viramgam at the time of the cession of the district in 1817, and succeeding kasbatis had from time to time been granted pattas by the Government of Bombay; the respondent claimed a proprietary right in the village and to be entitled to the renewal of the pattas:—

Held, upon the facts, that only a leasehold interest had been conferred upon the kasbatis by the Government of Bombay, and that the respondent had no proprietary right in the village.

APPEAL and cross-appeals, consolidated, from a judgment and decree of the High Court (April 16, 1909) affirming, as to the principal appeal, a judgment and decree of the District Judge of Ahmedabad (November 30, 1907).

The appeals related to the nature of the tenure of certain kasbatis of a village in pargana Viramgam in the Ahmedabad district.

The facts appear from the judgment of their Lordships. By an order dated January 27, 1898, the taluqdari Settlement Officer directed the respondent Rajbai, the daughter of one Bapabhai,

* *Present*: LORD ATKINSON, SIR GEORGE FARWELL, SIR JOHN EDGE, and MR. AMEER ALI.

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and Nandbai, the widow of one Fatumyia, to deliver up possession of the village in question, of which Bapabhai and Fatumyia had been kasbatis. The order was made in consequence of the view of the Government of Bombay that the kasbatis were merely lessees from the Government and that the direct heirs of the holders had from time to time been granted pattas by favour of the Government, and not in recognition of any right.

The respondent Rajbai and Nandbai, since deceased, instituted the suit in 1898 praying for a declaration that they were "entitled to hold possession and vahivat of the village and to enjoy the same."

The District Judge held that the kasbatis were taluqdars, and were proprietors prior to the British rule; that an arrangement made in 1823 recognized their permanent right to the villages left in their possession under that arrangement; that the pattas granted from time to time did not alter or affect the nature of their rights, but fixed the amount of revenue payable by them. He was of opinion that the title of the kasbatis was protected by Bombay Acts VI. of 1862 and VI. of 1888, and that, in any event, they were survey occupants, and in that capacity were not liable to ejectment.

The High Court (Chandavarkar and Heaton JJ.) delivered judgment on April 16, 1909. The learned judges were of opinion that the kasbatis were not lessees as the term is understood in English law, and that they had a right to hold permanently at a rent liable to revision and subject to express or implied conditions. One of the express conditions, they said, had consistently been that the kasbatis should not alienate their interest in the management of the villages; but there were other conditions both express and implied.

The learned judges remitted the case to the District Judge to ascertain what were the conditions above referred to.

The Government lodged a list of conditions which they desired to be inserted in the decree. The plaintiffs by their objections urged that no conditions could be annexed to their holding other than those imposed by Bombay Acts V. of 1879 and VI. of 1888.

The District Judge held that the only conditions, express or

implied, under which the village was held were those imposed by statute. He declined to specify the conditions in the decree.

The High Court affirmed the decision of the District Judge that the conditions were determined by statute, but thought it expedient to specify expressly in the decree what were deemed to be the statutory conditions, and the decree was accordingly so made. The principal appeal to His Majesty in Council was by the Secretary of State in regard to the finding that the respondent was not a lessee; there were consolidated cross-appeals as to the insertion of conditions in the decree and what those conditions should be.

Sir Erle Richards, K.C., and *Lowndes*, for the appellant. The evidence shows that the Government conferred no proprietary interest upon the kasbatis. The pattas were issued from time to time to direct heirs as a matter of favour and conferred only a leasehold interest: Peile's Report on the Ahmedabad Zillah, 1867 (Selections from Records of the Bombay Government, No. 106). Even if the respondent's ancestor had a proprietary right before the cession, which is not established, the Government were not bound to recognize that right: *Cook* v. *Sprigg*(1); *Balkishen Das* v. *Legge*.(2) Bombay Act VI. of 1862 does not apply to kasbatis. By s. 1 of Bombay Act VI. of 1888 that Act applies to "kasbatis," but the effect of s. 73 is to render the rights conferred by the Act upon an occupant under a lease subject to the terms of the lease. [Wilson's Glossary, v. "taluqdar," was referred to.]

De Gruyther, K.C., and *Parikh*, for the respondent. There was a settlement of the village in 1823, and the evidence shows that the Government has recognized the kasbatis as enjoying permanent rights. The pattas were issued in the ordinary course to fix the revenue payable; they did not constitute the kasbatis lessees for the periods for which they were given. [Bombay Regulation XVII. of 1827, Official Writings of Elphinstone, pp. 469,481 (Minute, April 6, 1821), Peile's Report (supra), and Proceedings in the Legislative Council regarding the Taluqdaris Act (March 8, 1862), were referred to.] Further, the kasbatis acquired a hereditable and transferable right under Bombay

(1) [1899] A.C. 572. (2) (1899) L.R. 27 Ind.Ap. 58.

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Acts VI. of 1862 and VI. of 1888. The statement in the preamble to the former Act that taluqdari estates in Ahmedabad are only held on leasehold tenure is contrary to historical truth: *Waghela Rajsanji* v. *Shekh Masludin.*(1)

Sir Erle Richards, K.C., replied.

The judgment of their Lordships was delivered by

LORD ATKINSON. These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively April 16, 1909, and April 11, 1911, modifying a decree of the District Judge of Ahmedabad, dated November 30, 1907.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Charodi, about 2200 acres in extent, situated in the pargana Viramgam, in the district of Ahmedabad in the province of Gujarat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the Courts below her right has been also based apparently upon the following title, namely this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village, but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would enable her to succeed in this action.

In order to arrive at a conclusion on the issue thus in dispute between the parties it is necessary to examine briefly the history of this district of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Mahomedans in religion, said to have originally

(1) (1887) L.R. 14 Ind.Ap. 89, at p. 91.

come from Delhi under the Great Mogul, and styled indifferently casbatees and kasbatis, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Charodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai alias Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapabhai, his only issue him surviving, and Bapabhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the kasbati class who was in possession of this village of Charodi at the date of the aforesaid cession. The term kasbatis, it is not disputed, was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by raiyats, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. At the time of the cession the kasbatis were possessed of seventeen villages within the pargana of which Charodi was one. The settlement of the territories ceded was not practically undertaken till the year 1822-1823.

In the interval an accredited public official of the East India Company was put in charge, duly authorized to investigate the local conditions, and make suggestions and recommendations for the carrying through of this work. In the conduct of this business and in discharge of these duties he made reports to his superiors in which he sketched the history of the kasbatis, the grassias, and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers of management and control. Some of these reports have been received in evidence

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apparently without objection. On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date August 3, 1822, to the Secretary of the Government of Bombay, and the second bearing date May 28, 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were seventeen villages in the Viramgam pargana, held for a considerable number of years by several families of kasbatis under a peculiar kind of tenure; that their possession had been frequently interrupted, and had not therefore been sufficiently continuous to found prescriptive rights; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the pargana, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had been intended than that the villages should remain in their temporary charge; that after the grant of the farm of Ahmedabad by the Peishwa to the Gaekwar, the kasbatis had enjoyed the produce of some of these villages for twenty-five or thirty years on a revenue which was increased or lowered according to the pleasure of the local managers; that in 1804 they were dispossessed of these latter by one Babaji Appaji, a manager of the Peishwa, who demanded a higher jama than the kasbatis would consent to pay, but were restored to possession ten years later; that thus by a train of circumstances of such an undefined nature that it was difficult to describe them, the class had acquired a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government; that since the authority of that Government had been established at Ahmedabad revenue settlements had been made with them, except where they refused to pay an adequate jama, "but being men of ignorance or bad circumstances and of very indolent habits," they were altogether incompetent to conduct village concerns; that their villages were of vast extent and capable of much improvement; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called leaseholders), and that he had every reason to believe they would be well

satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

Mr. Williamson then proposed for the consideration of the Government a plan to this effect: to give to each kasbati one, or, according to the circumstances and claim of the particular person, two, of the smaller villages on a jama less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Government Secretary wrote to the assistant in charge of the Collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date November 22, 1822, acknowledging the receipt of the latter's letter of August 3 previous, and informing him that though the plan he suggested might be agreeable to the kasbatis, the Governor in Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the kasbatis pensions, to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The kasbatis refused to accept pensions, but Mr. Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the kasbatis should be secured in permanent possession of such of their seventeen villages as should be left to them, whereas on May 28, 1823, he wrote to the Collector of Ahmedabad informing him that he (Williamson) "had concluded an arrangement with the kasbatis of Viramgam by which they are to retain, during the pleasure of the Government, nine of the villages found under their management when the pargana fell into our possession."

He proceeded to point out that by this arrangement the interference of the kasbatis would be removed from eight of their

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villages, the produce of which was valued at Rs. 13,800, while that of those remaining with them was only valued at Rs. 5300, but that the jama in respect of these latter was so small, namely, Rs. 1925, that there would remain for their maintenance Rs. 3375, a sum differing but little from that of Rs. 3820, which, according to his calculation, was all that would have been available for their maintenance had they continued in possession of their seventeen villages. Then follows this passage: "The lease being granted for seven years affords the kasbatis an opportunity of availing themselves of these capabilities" (i.e., the capabilities of their villages of improvement). "The condition of the villages and the rules respecting leases laid down by Government guided me in fixing the term."

On June 23, 1823, the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an "agreement with the kasbatis by which they are to retain during the pleasure of Government nine of the villages found under their management when the pargana fell into our possession."

The expression "at the pleasure of Government" is not very happily chosen. Since leases for terms of seven years were to be given to the kasbatis, it obviously could not have meant that they were to hold these nine villages merely as tenants at will of the Government. What it must, in their Lordships' view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases the Government would be free to deal with them as it pleased, to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports it is essential to consider what was the precise

relation in which the kasbatis stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new sovereign, of which they were thereafter possessed. The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognized these ante-cession rights of the kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower Courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *Secretary of State for India* v. *Kamachee Boye Sahaba*(1), decided in the year 1859, and *Cook* v. *Sprigg*(2), decided in the year 1899.

In the first case this Board had to deal with the action of the East India Company in seizing in exercise of their sovereign power, in trust for the British Government, the Raj of Tanjore, and the whole property of the deceased Rajah, as an escheat, on the ground that, by reason of the failure of the male heirs of the latter, the dignity of the Raj was extinct, and that the property of the Rajah had thereby lapsed to the British Government. Lord Kingsdown, delivering the judgment of the Board, is reported at p. 540 to have expressed himself thus: "The result,

(1) (1859) 7 Moo. Ind. Ap. 476.

(2) [1899] A.C. 572.

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in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company, and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that if a wrong has been done it is a wrong for which no municipal Court of justice can afford a remedy."

Now, in that case the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding sovereign, the paramount chief of Pongoland. The appellants sought to enforce in a Court of law their rights under this concession against the English Government to which the territory over which the concession had been given was ceded by this chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which municipal Courts are authorized to enforce. As far, therefore, as the legal rights of the kasbatis, enforceable against the Indian Government in Indian Courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the kasbatis may have been quite erroneous. The kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so to what, extent rests upon the respondent. The kasbatis were not in a position in 1822 to reject Mr. Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Mr. Williamson's terms had the permanent possession of their villages not been promised to them. It may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the kasbatis fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot per se create legal right to their continuance.

Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no patta or kabulyat executed in 1823 was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a patta then granted to the kasbatis then in possession of the nine villages retained by them, including this village of Charodi. According to these records a patta of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a jamabandi of 100 rupees, with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow any one to give, any land of the village in pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the patta they absolutely negative the existence of any legal right, enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

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As to this village of Charodi, one must start then on the inquiry as to what rights were granted by the Bombay Government to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which have elapsed between the year 1822 and the institution of this present suit, not even in one of the several pattas granted to them is any provision to be found to the effect that upon its expiration a new patta is to be granted to the lessees or their representatives or successors, while the very first of these pattas contained a clause expressly negativing the existence of such a right. The reasonable and proper inference to be drawn from the silence of the pattas on this important point is, Sir Erle Richards contends on behalf of the appellants, that the legal right to obtain renewals of the pattas was never conferred upon the respondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but, unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instruments could scarcely have been more obscure had obscurity been aimed at, and have resolutely omitted from every patta but the first the ordinary provision to be found in every properly drawn lease, that the lessee shall deliver up possession at the end of the term. Mr. De Gruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the patta, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in possession of this village of Charodi, in which the amount of the jama was fixed, that the effect of such a settlement is that the person in possession, by whom the jama is to be paid, was fixed or settled permanently in the possession, at all events, of this village, with a right to manage it, that the pattas could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the patta only dealt with

the jama and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well founded, it is necessary to examine in detail the provisions of those pattas the contents of which are satisfactorily proved.

First, then, as to the pattas granted on August 31, 1833. In the year 1827, during the currency of the first lease, a report was made to the taluqdari Settlement Offier by Lieutenant Melville, of the 7th Regiment, in which he described the kasbatis of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under pattas for terms of years granted to them by the Bombay Government. No importance can therefore be attached to his use of the word "proprietors." In July, 1831, the question of the increase of the jama fixed by the first batch of leases was under consideration. Several kasbatis presented a petition to the Government insisting that the jama fixed in 1822 was then fixed permanently and should not be increased, also asserting that it was part of the arrangement made by Mr. Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated September 16, 1831, was to the effect that the order made by the Government on November 16, 1822, could not be set aside. Some time thereafter the above-mentioned lease was granted to Bapabhai, the father of Fatumyia, and his brother, Miabhai, as the lessees. It is indorsed as having been delivered to the latter. The jama is increased to 142 rupees, payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830-31 and terminating in the year 1836-37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the patta, and cause the revenue of the village to be collected by other hands, the lessees being responsible for any deficit in the year in which the patta is taken over, and that at the end of that particular year the Government "would if it so pleases give the village to some person other than the

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lessees, who shall not get it," but should be held liable for any loss which might accrue to the Government during the remainder of the term.

Clause 17 provides that if the Government should find that the lessees were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matter, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the patta would be taken back from them, and they would have to pay such a penalty as the Government might choose to impose.

The fact that the granting of a patta for seven years was part of the arrangement made with Mr. Williamson, and that the patta then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the transfer of the village in certain events to persons other than the lessees, are quite destructive of the theory that these pattas merely regulated the amount of the jama but not the tenure, and that independently of them altogether this family of kasbatis was fixed in permanent possession of this village of Charodi. In the year 1838 a new patta was apparently granted for seven years, but neither the original nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commission of Ahmedabad a report, dated September 8, 1845, proposing, amongst other things, to increase the jama of this village. In it he sets forth that the kasbatis, being sent for in order to enter into a fresh settlement, declared that the settlement made by Mr. Williamson was permanent and that the jama was not to be increased. They were unwilling to take leases on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the kasbatis to the receipt of 20 per cent. on the revenue pending the pleasure of Government. In the tenth paragraph of the report he proceeds to add: "This long enjoyment of the villages at the same rental has increased their" (i.e., the kasbatis') " real or feigned impression that the original settlement was permanent, which it certainly

was not." He then proposed that the rent of the villages should be slightly increased, and that, if the kasbatis did not accept the leases offered, the villages should continue under the direct management of the Government, and the kasbatis should be allowed 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's arrangement. They only differed as to its terms. The kasbatis insisted that according to it the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter dated February 24, 1847, addressed by the direction of the Governor in Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the kasbatis did not appear from the former proceedings connected with the settlements previously made with them to have any valid title to "a permanent continuance of the terms upon which they have hitherto held their villages," and suggesting that the jama should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor in Council desired that a distinct reservation should be inserted in the new lease indorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, an allowance being made to the kasbatis during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the kasbatis as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the kasbatis and take the management of these villages into Government hands.

The existence, however, in the Bombay Government of the power and right which they assert in this letter of February 24,

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1847, belonged to them is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new patta of the village, bearing date September 4, 1849, was granted to Fatumyia and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years from 1844-45 to 1850-51 at the increased yearly rent of Rs. 144.1.9, payable by five instalments on the days therein named. The lease is executed by the lessees. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It is provided, first, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. Secondly, that the lessees shall not alienate or pledge the village or the land composing it to any one. Thirdly, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should therefore make good arrangements for the prevention of crime in the village, or otherwise the settlement (tharav) would be cancelled. Fourthly, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the Courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried on by the Government, the settlement would be cancelled, and the whole income of the village be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, but evidently introduced to put an end for the future to all controversy touching the increase of the jama. It provides that the village is given to the lessees on patta according to the settlement or agreement thereinbefore set out,

that when the lease expired the lessees should hold charge of all income and produce of the village, and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. Clause 11 provided that the village was given on patta to the lessees on the agreement thereinbefore set out, and that if they did not act according to the agreement the patta should be void.

The existence of the statement that the patta was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent the two lessees and another person had presented a petition to the Revenue Commissioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not left in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the patta merely fixed the amount of the rent, and that by the settlements the lessees or their ancestors had acquired as against the Bombay Government a right to the property in, or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced indicating even in the most remote way that the lessees were entitled at the end of each lease to have a renewal of it granted to them. Prima facie a lease for a term does not import any right to a renewal of it. On the contrary, it prima facie implies that the lessee's right to the premises demised ends with the term. In order that the respondent should succeed, therefore, on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal.

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In their Lordships' view it would require something much more clear, plain, and explicit than this confused and almost unintelligible clause to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new patta was granted in 1851. The lessees continued to hold possession and to pay the rent till 1860. Fresh pattas for one year each were given in the years 1860 and 1861, at an increased rent of 160 rupees, and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the kasbatis under Williamson's settlement, namely, the villages of Keela and Leah, or Lea. The said Fatumyia claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor in Council passed a resolution, dated November 27, 1874, by which it was declared that the tenure of the kasbatis was merely leasehold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on July 5, 1877, approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a sanad granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this sanad was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere leaseholder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any Court of law. The question of the renewal of the leases of the kasbati tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on July 25, 1877, passed by that Government to the effect that it appeared all the leases had expired; that there was no necessity to make any change, it being

quite clear that the villages were held on leasehold tenure at the pleasure of the Government; that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue so to do, and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up and on October 7, 1878, approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease the lessee should, without objection or obstruction, yield up the village demised unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on December 22, 1879, was granted to Fatumyia and Bapabhai, the respondent's father. The kabulyat was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not therefore desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently entertained by the Government in reference to the true position and rights of the kasbatis. No further leases were granted. The lessees and those who succeeded them continued to pay the rent reserved, and notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai, requiring them to quit and deliver up possession of the village of Charodi on July 31 following. It was not disputed that, if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the kasbatis and their villages, including that of Charodi, has alone been dealt with.

Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the burden

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which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangement; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Charodi claimed by her; that they never recognized or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned); that this Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village; and that the granting or withholding of a lease of it rested from the first solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the grassias. They were ancient Rajput proprietors and, before the cession of the Ahmedabad Zillah, stood to their native sovereigns in that relation, their lands being cultivated by raiyat tenants from year to year and at will. They and the mewassies were clearly distinguishable from the kasbatis. The last-named held their lands by contract, neither by sanad nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the grassias and those of the kasbatis. The word "taluq" was first applied to these Rajput proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the grassias, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government.

altogether irrespective of what their position and rights may have been before the cession of their territory.

All this is stated at length in the account by Mr. J. Peile, taluqdari Settlement Officer of the taluqdari of Ahmedabad Zillah, and the measures adopted for their restoration under and in connection with the Act VI. of 1862 of the Bombay Legislature, published in 1867 (pp. 7, 9, 14, 42, 43—47, 64, and 67). Indeed, in the preamble of that statute it is recited that these taluqdari estates are only held on leasehold tenure determinable at the pleasure of the Government. So that the case of the grassias makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new sovereign, when it comes to be a question of legal right, the contract with the new sovereign is conclusive and the rights against the old sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act VI. of 1862, for the reasons given in the above-mentioned publication of Mr. Peile, does not apply to kasbati lessees at all. They never were taluqdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the grassias, and therefore did not suffer the injustice which the statute was designed to remedy.

The statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, &c. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the above-mentioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a taluqdar is defined to include "a thakur, mewassie, kasbati, and naik." Sect. 23 provides that nothing in the Act shall be deemed to affect the validity of any agreement entered into before the passing of the Act by or with a taluqdar and still in force as to the amount of his jama, nor of any settlement of the amount of jama made by or under the orders of Government

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for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not passed. Sect. 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By s. 33 it is also provided that, when applying this Code of 1879 to the estates to which this statute of 1888 applies, the word "taluqdar" shall be substituted for the word "occupant," the words "registered taluqdar" for the words "registered occupant", and the words "taluqdars holding" for the word "occupancy." Sect. 73 of the Code provides that "the right of occupancy " shall, subject to the provisions contained in s. 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a hereditable and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution of the words "the right of occupancy" for the words "the right or interest of a taluqdar" in or to his holding is that a kasbati's interest in a leasehold held for a term of years is changed in its nature and becomes a hereditable and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation; and notwithstanding also that by s. 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "talukdar" or a "thakur," "mewassie," "kasbati," or "naik," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and prima facie no longer. Sect. 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the

passage printed at p. 496 of the Record in which the High Court deals with the lease of 1833: "There are no other provisions for forfeiture of the management. There is no provision for renewal of the patta, but it is to be inferred from the nature of the management and from the fact that the patta was for a term, that renewal was contemplated. This inference is supported by both previous and subsequent events; by previous events, because in 1823 permanent possession by the kasbatis was contemplated; by subsequent events, because the renewal did, in fact, take place."

Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both Courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed, and the cross-appeal dismissed, and that judgment should be entered for the Secretary of State, dismissing the respondent's action. They will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Solicitor for appellant: *The Solicitor, India Office.*
Solicitors for respondent: *T. L. Wilson & Co.*

[redacted] [redacted] Acc. No. [redacted]

Class No. [redacted] Book No. [redacted]

Author [redacted]

Title [redacted]

[redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

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Author [redacted]

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